

# Exhibit 92

Fill in this information to identify the case:

Debtor 1 Sears Holdings Corporation

Debtor 2 \_\_\_\_\_  
(Spouse, if filing)

United States Bankruptcy Court for the: Southern District of New York

Case number 18-23538-rdd

Official Form 410

Proof of Claim

04/16

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?		<u>Wilmington Trust, National Association, as indenture trustee and collateral agent</u> Name of the current creditor (the person or entity to be paid for this claim)	
		Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?  Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Where should notices to the creditor be sent?	Where should payments to the creditor be sent? (if different)	
	<u>Edward M. Fox - Seyfarth Shaw LLP</u> Name <u>620 Eighth Avenue</u> Number Street <u>New York</u> <u>NY</u> <u>10018</u> City State ZIP Code Contact phone <u>212-218-4646</u> Contact email <u>emfox@seyfarth.com</u>  Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	_____ Name _____ Number Street _____ City State ZIP Code Contact phone _____ Contact email _____	
4. Does this claim amend one already filed?		<input type="checkbox"/> No <input checked="" type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?		<input type="checkbox"/> No <input checked="" type="checkbox"/> Yes. Who made the earlier filing? _____	

**Part 2: Give Information About the Claim as of the Date the Case Was Filed**

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____
7. How much is the claim? \$ <u>91,950,191.25</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input checked="" type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information.  <u>Money loaned.</u>
9. Is all or part of the claim secured?	<input type="checkbox"/> No <input checked="" type="checkbox"/> Yes. The claim is secured by a lien on property.  Nature of property: <input type="checkbox"/> Real estate. If the claim is secured by the debtor's principal residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input checked="" type="checkbox"/> Other. Describe: <u>see attached Addendum</u>  Basis for perfection: <u>see attached Addendum</u> Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)  Value of property: \$ <u>Unknown</u> Amount of the claim that is secured: \$ <u>Unknown</u> Amount of the claim that is unsecured: \$ <u>Unknown</u> (The sum of the secured and unsecured amounts should match the amount in line 7.)  Amount necessary to cure any default as of the date of the petition: \$ _____  Annual Interest Rate (when case was filed) <u>6-5/8%</u> <input checked="" type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? ☐ No ☒ Yes. Check one:

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	Amount entitled to priority: \$ _____
<input type="checkbox"/> Up to \$2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____
<input type="checkbox"/> Wages, salaries, or commissions (up to \$12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____
<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____
<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____
<input checked="" type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)(2) that applies.	\$ <u>Unknown</u>

\* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

**Part 3: Sign Below**

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☒ I am the creditor.  
☐ I am the creditor's attorney or authorized agent.  
☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.  
☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

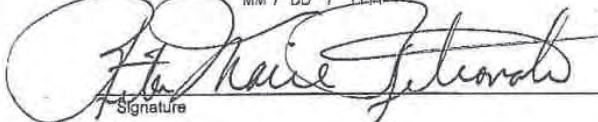
I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 02/20/2019

MM / DD / YYYY

  
Signature

Print the name of the person who is completing and signing this claim:

Name Rita Marie Ritrovato  
First name Middle name Last name

Title Vice President

Company Wilmington Trust, National Association  
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address 1100 North Market Street - Rodney Square North  
Number Street

Wilmington DE 19890  
City State ZIP Code

Contact phone 302-636-5137 Email rritrovato@wilmingtontrust.com



**ADDENDUM TO PROOF OF CLAIM OF  
WILMINGTON TRUST, NATIONAL ASSOCIATION,  
AS SUCCESSOR INDENTURE TRUSTEE AND  
SUCCESSOR COLLATERAL AGENT,  
AGAINST**

SEARS, ROEBUCK AND CO. (CASE NO. 18-23537-rdd)	KMART CORPORATION (CASE NO. 18-23549-rdd)	SEARS PROTECTION COMPANY (FLORIDA), L.L.C. (CASE NO. 18-23569-rdd)
SEARS HOLDINGS CORPORATION (CASE NO. 18-23538-rdd)	PRIVATE BRANDS, LTD. (CASE NO. 18-23551-rdd)	KMART OF WASHINGTON LLC (CASE NO. 18-23570-rdd)
KMART HOLDING CORPORATION (CASE NO. 18-23539-rdd)	SEARS HOLDINGS MANAGEMENT CORPORATION (CASE NO. 18-23553-rdd)	KMART STORES OF ILLINOIS LLC (CASE NO. 18-23571-rdd)
KMART OPERATIONS LLC (CASE NO. 18-23540-rdd)	SEARS HOME IMPROVEMENT PRODUCTS, INC. (CASE NO. 18-23555-rdd)	KMART STORES OF TEXAS LLC (CASE NO. 18-23572-rdd)
SEARS OPERATIONS LLC (CASE NO. 18-23541-rdd)	SEARS PROTECTION COMPANY (CASE NO. 18-23558-rdd)	MYGOFER LLC (CASE NO. 18-23573-rdd)
A&E FACTORY SERVICE, LLC (CASE NO. 18-23543-rdd)	SEARS ROEBUCK ACCEPTANCE CORP. (CASE NO. 18-23560-rdd)	KMART OF MICHIGAN, INC. (CASE NO. 18-23576-rdd)
A&E HOME DELIVERY, LLC (CASE NO. 18-23544-rdd)	SEARS, ROEBUCK DE PUERTO RICO, INC. (CASE NO. 18-23561-rdd)	SOE, INC. (CASE NO. 18-23578-rdd)
A&E LAWN & GARDEN LLC (CASE NO. 18-23545-rdd)	CALIFORNIA BUILDER APPLIANCES, INC. (CASE NO. 18-23565-rdd)	STARWEST, LLC (CASE NO. 18-23579-rdd)
A&E SIGNATURE SERVICE, LLC (CASE NO. 18-23546-rdd)	FLORIDA BUILDER APPLIANCES, INC. (CASE NO. 18-23566-rdd)	KMART.COM LLC (CASE NO. 18-23585-rdd)
	KLC, INC. (CASE NO. 18-23568-rdd)	SEARS BRANDS MANAGEMENT CORPORATION (CASE NO. 18-23586-rdd)

1. Pursuant to an Indenture dated as of October 12, 2010 (the “Initial Indenture”; true and correct copy annexed hereto as Exhibit A) among Sears Holdings Corporation (the “Issuer”), the Guarantors Party Thereto, and Wells Fargo Bank, National Association (“Wells Fargo”), as trustee and collateral agent, the Issuer issued \$1,250,000,000 of 6-5/8% Senior Secured Notes due 2018 (the “Notes”).

2. The Initial Indenture was amended by a First Supplemental Indenture dated as of April 5, 2011 (the “First Supplement”; true and correct copy annexed hereto as Exhibit B), a Second Supplemental Indenture dated as of July 7, 2015 (the “Second Supplement”; true and correct copy annexed hereto as Exhibit C), a Third Supplemental Indenture dated as of September 19, 2016 (the “Third Supplement”; true and correct copy annexed hereto as Exhibit D), a Fourth Supplemental Indenture dated as of January 9, 2018 (the “Fourth Supplement”; true and correct copy annexed hereto as Exhibit E) and a Fifth Supplemental Indenture dated as of March 20, 2018 (the Fifth Supplement”; true and correct copy annexed hereto as Exhibit F), the Initial Indenture as amended, supplemented or otherwise modified by the First Supplement, the Second Supplement, the Third Supplement, the Fourth Supplement and the Fifth Supplement, the “Indenture”).

3. Pursuant to an instrument of resignation, appointment, and acceptance, dated June 25, 2014 (the “Tri-Party Agreement”; true and correct copy annexed hereto as Exhibit G), by and among the Issuer, Wells Fargo, and Wilmington Trust, National Association, Wells Fargo resigned as the indenture trustee, and Wilmington Trust was appointed as Successor Trustee (the “Indenture Trustee”) and Successor Agent (the “Collateral Agent”) (in such capacities, “Wilmington Trust”).

4. Pursuant to the terms of the Indenture, repayment of the Notes is guaranteed by each of Sears, Roebuck and Co., Kmart Holding Corporation, Kmart Operations LLC, Sears Operations LLC, A&E Factory Service, LLC, A&E Home Delivery, LLC, A&E Lawn & Garden LLC, A&E Signature Service, LLC, Kmart Corporation, Private Brands, Ltd., Sears Holdings Management Corporation, Sears Home Improvement Products, Inc., Sears Protection Company, Sears Roebuck Acceptance Corp., Sears, Roebuck de Puerto Rico, Inc., California Builder Appliances, Inc., Florida Builder Appliances, Inc., KLC, Inc., Sears Protection Company (Florida), L.L.C., Kmart of Washington LLC, Kmart Stores of Illinois LLC, Kmart Stores of Texas LLC, Mygofer LLC, Kmart of Michigan, Inc., SOE, Inc., Starwest, LLC, Kmart.com LLC, Sears Brands Management Corporation (collectively, the “Guarantors”).

5. Pursuant to a Security Agreement dated as of October 12, 2010, among the Issuer, the Grantors Party Thereto (the “Grantors”) and Wells Fargo, as amended by a First Amendment to security agreement dated as of September 1, 2016 among the Issuer, the Grantors Party Thereto and the Collateral Agent, and as amended and restated by an Amended and Restated Security Agreement dated as of March 20, 2018 among the Issuer, the Grantors Party Thereto and the Collateral Agent, (the “Security Agreement”; true and correct copy annexed hereto as Exhibit H), the Issuer and the Grantors granted a security interest (the “Security Interest”) in all of the Collateral (as defined in the Security Agreement) to secure payment of the fees and expenses of the Collateral Agent and the Indenture Trustee and repayment of the Notes.

6. The Security Interest has been perfected by, *inter alia*, the filing of UCC-1 financing statements against the Grantors with the Secretaries of State of Delaware, Florida, Illinois, Michigan, New York, Pennsylvania, Puerto Rico, Texas and Washington and the Commissioner of Banking and Insurance of Guam, all as more particularly set forth on the chart

annexed hereto as Exhibit I, and such other documents as are necessary or appropriate to perfect the Security Interests including, without limitation, UCC-3 continuation statements.

7. On October 15, 2018 (the "Petition Date"), the Issuer and each of the Guarantors filed voluntary petitions for relief under Chapter 11 of title 11 of the United States Code.

8. As of the Petition Date, the Issuer and each Guarantor was, and remains, indebted to the Indenture Trustee in the amount of Ninety-One Million, Nine Hundred Fifty Thousand, One Hundred Ninety-One and 25/100 Dollars (\$91,950,191.25), consisting of Eighty-Nine Million, Two Thousand and 00/100 Dollars (\$89,002,000.00) in principal amount plus Two Million, Nine Hundred Forty-Eight Thousand, One Hundred Ninety-One and 25/100 Dollars (\$2,948,191.25) of accrued and unpaid interest owing with respect to the Notes as of the Petition Date. Wilmington Trust reserves its rights pursuant to 11 U.S.C. § 506(b).

9. Wilmington Trust asserts against the Issuer, and against each Guarantor, a claim for the full amount owing under the Indenture as set forth in this Proof of Claim. This claim is secured to the extent of the value of the Collateral and is otherwise unsecured.

10. Pursuant to Section 7.01 of the Indenture and Section 7.6 of the Security Agreement, Wilmington Trust is entitled to payment of its fees and expenses, including the fees and disbursements of its counsel and experts, as Indenture Trustee and as Collateral Agent, respectively, (collectively, the "Fees and Expenses") which amounts are presently unliquidated.

11. To secure the obligations of Issuer and each Guarantor to the Indenture Trustee under Section 7.01 of the Indenture and to the Collateral Agent under Section 7.6 of the Security Agreement, Section 5.4 of the Security Agreement provides for payment of all such fees and expenses out of the proceeds of the Collateral. In addition, pursuant to Section 7.01 of the Indenture, Wilmington Trust has a lien prior to the Notes on all money or property held or collected by it as Indenture Trustee or Collateral Agent.

12. Pursuant to Fed R. Bankr. P. 3021, all distributions on account of the claim under the Indenture asserted hereby must be made to Wilmington Trust.

13. Pursuant to Fed. R. Bankr. P. 3003(c)(5) and Section 6.10 of the Indenture, Wilmington Trust is authorized to file this Proof of Claim on behalf of all holders of the Notes.

14. Without prejudice to its right to assert that the Fees and Expenses incurred on and after the Petition Date constitute an administrative expense claim under Sections 503 and 507 of the Bankruptcy Code and Section 7.01 of the Indenture, Wilmington Trust hereby reserves the right to amend or supplement this Proof of Claim to include, among other things, accrued and unpaid Expenses incurred by Wilmington Trust after the Petition Date.

15. In its capacity as Indenture Trustee and Collateral Agent, Wilmington Trust further reserves the right to file any request for payment of an administrative expense to which it may be entitled, including as a super priority administrative expense for diminution in value of the Collateral from and after the Petition Date, in an amount to be determined.

16. The Issuer and each Guarantor is further obligated to Wilmington Trust pursuant to Section 7.01 of the Indenture and Section 7.6 of the Security Agreement in an unliquidated amount for any costs and expenses incurred or to be incurred by Wilmington Trust in defending itself against any claim or liability in connection with the exercise or performance of its obligations under the Indenture or under the Security Agreement, respectively.

17. Wilmington Trust expressly reserves the right to amend or supplement this Proof of Claim if it should deem it necessary and appropriate for any reason, including, without limitation, to provide an updated statement of amounts due or for any other purpose for which a Proof of Claim filed in this case may be amended.

18. The filing of this Proof of Claim is not: (i) a waiver or release of any rights of Wilmington Trust or of any holder of the Notes against any person, entity, or property;

(ii) consent by Wilmington Trust or any holder of the Notes to the jurisdiction of this Court, or to its exercise of the judicial power or to its entry of final orders and judgments, with respect to the subject matter of this claim, any objections or other proceedings commenced with respect thereto, or any other proceedings commenced in this case or otherwise involving Wilmington Trust or the holders of the Notes; or (iii) a waiver of the right of Wilmington Trust or the holders of the Notes to move to withdraw the reference, or otherwise to challenge the jurisdiction of, or the exercise of the judicial power by, this Court with respect to the subject matter of this claim, any objections or other proceedings commenced with respect thereto or any other proceedings commenced in this case against, or otherwise involving, Wilmington Trust or the holders of the Notes.

## **EXHIBIT A**



EXECUTION VERSION

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SEARS HOLDINGS CORPORATION,

THE GUARANTORS PARTY HERETO

and

WELLS FARGO BANK, NATIONAL ASSOCIATION,  
as Trustee and Collateral Agent

INDENTURE

Dated as of October 12, 2010

6 $\frac{7}{8}$ % Senior Secured Notes due 2018

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JX 132-11

**CROSS-REFERENCE TABLE**

<b>TIA Section</b>	<b>Indenture Section</b>
310(a)(1).....	7.05
(a)(2).....	7.05
(a)(3).....	N.A.
(a)(4).....	N.A.
(a)(5).....	7.06
(b).....	7.04; 7.06; 12.02
(b)(1).....	7.06
(c).....	N.A.
311(a).....	6.11
(b).....	6.11
(c).....	N.A.
312(a).....	2.06
(b).....	12.03
(c).....	12.03
313(a).....	7.11
(b)(1).....	N.A.
(b)(2).....	7.01(a); 7.11
(c).....	7.11; 12.02
(d).....	7.11
314(a).....	4.02; 4.03; 11.03;
	12.02
(b).....	11.02
(c)(1).....	12.04
(c)(2).....	12.04
(c)(3).....	N.A.
(d).....	11.03
(e).....	12.05
(f).....	N.A.
315(a).....	N.A.
(b).....	7.03; 12.02
(c).....	7.02
(d).....	7.02(b)
(e).....	6.12
316(a)(last sentence).....	2.10
(a)(1)(A).....	6.05
(a)(1)(B).....	6.04
(a)(2).....	N.A.
(b).....	6.08
(c).....	8.04
317(a)(1).....	6.09
(a)(2).....	6.10
(b).....	2.05
318(a).....	12.01

N.A. means Not Applicable

Note: This Cross-Reference Table shall not, for any purpose, be deemed to be a part of the Indenture.

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Exhibit F	Form of Certificate To Be Delivered in Connection with Transfers Pursuant to Regulation S

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Exhibit G Notation of Guarantee



INDENTURE, dated as of October 12, 2010, among SEARS HOLDINGS CORPORATION, a Delaware corporation (the “Issuer”), the Guarantors (as defined herein) listed on Schedule A hereto and WELLS FARGO BANK, NATIONAL ASSOCIATION, as trustee (the “Trustee”) and Collateral Agent (as defined herein).

Each party agrees as follows for the benefit of the other parties and for the equal and ratable benefit of the Holders (as defined herein):

## ARTICLE ONE

### DEFINITIONS AND INCORPORATION BY REFERENCE

#### SECTION 1.01. Definitions.

“Additional First Lien Obligations” means any indebtedness of the Issuer or any Restricted Subsidiary, other than the Credit Agreement Obligations, that is secured by a Lien on the Collateral ranking contractually prior to the Notes Liens and that is permitted to be incurred pursuant to clause (2) of the definition of “Permitted Liens”; *provided* that the representative of such Additional First Lien Obligations executes a joinder agreement to the Intercreditor Agreement (or another intercreditor agreement on terms not less favorable to the Holders of Notes than the Intercreditor Agreement) agreeing to be bound thereby. At the Issuer’s option, any indebtedness secured by a Lien permitted by clause (2) of the definition of “Permitted Liens” may be “Additional First Lien Obligations”.

“Additional Interest” means any additional interest pursuant to Section 5 of the Initial Purchasers Registration Rights Agreement or Section 4 of the Pension Plan Registration Rights Agreement, as applicable.

“Additional Notes” means an unlimited principal amount of Notes having identical terms and conditions (other than issue date, issue price and initial interest payment date) to the Notes issued on the Issue Date pursuant to Article Two.

“Affiliate” of any specified Person means any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For the purposes of this definition, “control” when used with respect to any specified Person means the power to direct the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; and the terms “controlling” and “controlled” have meanings correlative to the foregoing.

“Agent” means the Collateral Agent, Depository Custodian, any Registrar, Paying Agent or agent for service of notices and demands.

“Applicable Procedures” means, with respect to any transfer, payment, tender, redemption or exchange of or for beneficial interests in any Global Certificate, the rules and procedures of the Depository, Euroclear and Clearstream that apply to such transfer, payment, tender, redemption or exchange.

“Attributable Debt” in respect of a Sale and Leaseback Transaction means, at the time of determination, the present value discounted at the rate of interest implicit in the terms of the lease (as determined in good faith by the Issuer) of the obligations of the lessee under such lease for net rental payments during the remaining term of the lease (including any period for which such lease has been extended or may, at the Issuer’s option, be extended).

"Bankruptcy Law" means Title 11, U.S. Code or any similar federal or state law for the relief of debtors.

"Board of Directors" means either the board of directors of the Issuer or any duly authorized committee of that board or any committee of officers or other representatives of the Issuer duly authorized by a Board Resolution to act on behalf of that board or in its stead.

"Board Resolution" means a copy of a resolution certified by the Secretary or an Assistant Secretary of the Issuer to have been duly adopted by the Board of Directors and to be in full force and effect on the date of such certification, and delivered to the Trustee.

"Borrowing Base" means, as of any date, the sum of (1) 90% of the book value (calculated in accordance with GAAP) of the accounts receivable of the Issuer and the Guarantors, on a consolidated basis, on such date and (2) 65% of the book value (calculated in accordance with GAAP) of the inventory of the Issuer and the Guarantors, on a consolidated basis, on such date.

"Capital Stock" means, as to any Person, the capital stock of such Person of every class, whether now or hereafter authorized, regardless of whether such capital stock shall be limited to a fixed sum or percentage with respect to the rights of the holders thereof to participate in dividends and in the distribution of assets upon the voluntary or involuntary liquidation, dissolution or winding up of such Person.

"Change of Control" means the occurrence of any of the following: (1) the direct or indirect sale, lease, transfer, conveyance or other disposition (other than by way of merger or consolidation), in one or more series of related transactions, of all or substantially all of the assets of the Issuer and its Subsidiaries, taken as a whole, to any Person, other than a Permitted Holder, the Issuer or one of its Subsidiaries; (2) the Issuer becomes aware of the consummation of any transaction (including, without limitation, any merger or consolidation) the result of which is that any Person other than a Permitted Holder becomes the beneficial owner (as defined in Rules 13d-3 and 13d-5 under the Exchange Act), directly or indirectly, of more than 50% of the Issuer's outstanding Voting Stock or other Voting Stock into which the Issuer's Voting Stock is reclassified, consolidated, exchanged or changed, measured by voting power rather than number of shares; (3) the first day on which a majority of the members of the Issuer's Board of Directors are not Continuing Directors; or (4) the adoption of a plan relating to the Issuer's liquidation or dissolution. Notwithstanding the foregoing, a transaction will not be deemed to involve a Change of Control under clause (2) above if (i) the Issuer becomes a direct or indirect wholly-owned subsidiary of a holding company and (ii)(A) the direct or indirect holders of the Voting Stock of such holding company immediately following that transaction are substantially the same as the holders of the Issuer's Voting Stock immediately prior to that transaction or (B) immediately following that transaction no Person (other than a holding company satisfying the requirements of this sentence or a Permitted Holder) is the beneficial owner, directly or indirectly, of more than 50% of the Voting Stock of such holding company.

"Change of Control Notice" has the meaning provided in the definition of "Change of Control Offer."

"Change of Control Offer" means a written offer (the "Change of Control Notice") sent by or on behalf of the Issuer by first-class mail, postage prepaid, or by electronic delivery to each Holder, with a copy to the Trustee, at its address appearing in the register for the Notes on the date of the Change of Control Offer offering to purchase all outstanding Notes in accordance with Section 4.07. Unless otherwise required by applicable law, the Change of Control Notice shall specify the payment date (the "Change of Control Payment Date") for the Change of Control Offer, which shall be not less than 30 days nor more than 60 days after the date such Change of Control Notice is mailed or electronically delivered.

The Change of Control Notice shall contain all the information required by applicable law to be included therein and shall describe the transaction that constitutes or may constitute the Change of Control Triggering Event. The Change of Control Notice shall also state:

- (1) that the Change of Control Offer is being made pursuant to Section 4.07 of this Indenture;
- (2) the Change of Control Payment Date;
- (3) the Change of Control Payment;
- (4) that the Holder may tender all or any portion of the Notes registered in the name of such Holder and that any portion of a Note tendered must be tendered in denominations of \$2,000 principal amount or an integral multiple of \$1,000 in excess thereof and that all Notes tendered in such manner for payment and not withdrawn shall be accepted;
- (5) the place or places where Notes are to be surrendered for tender pursuant to the Change of Control Offer;
- (6) that interest on any Note not tendered pursuant to the Change of Control Offer will continue to accrue;
- (7) that on the Change of Control Payment Date the Change of Control Payment will become due and payable upon each Note being accepted for payment pursuant to the Change of Control Offer and that, unless the Issuer defaults in the payment of the Change of Control Payment therefor, interest thereon shall cease to accrue on and after the Change of Control Payment Date;
- (8) that each Holder electing to tender all or any portion of a Note pursuant to the Change of Control Offer will, subject to Applicable Procedures, be required to surrender such Note, with the form entitled "Option of Holder to Elect Purchase" on the reverse of the Note completed, at the place or places specified in the Change of Control Notice on or prior to the close of business on a date no earlier than the third Business Day prior to the Change of Control Payment Date (such Note being, if the Issuer so requires, duly endorsed by, or accompanied by a written instrument of transfer in form satisfactory to the Issuer duly executed by, the Holder thereof or its attorney duly authorized in writing);
- (9) that Holders will, subject to Applicable Procedures, be entitled to withdraw all or any portion of Notes tendered if the Issuer receives, not later than the close of business on the fifth Business Day preceding the Change of Control Payment Date, a facsimile transmission or letter setting forth the name of the Holder, the principal amount of the Note the Holder tendered, the certificate number of the Note the holder tendered and a statement that such Holder is withdrawing all or a portion of its tender;
- (10) that in the case of any Holder whose Note is purchased only in part, subject to Applicable Procedures, the Issuer shall execute and deliver to the Holder of such Note without service charge, a new Note or Notes, in an aggregate principal amount equal to and in exchange for the unpurchased portion of the Note so tendered, in denominations of \$2,000 principal amount or integral multiples of \$1,000 in excess thereof; and

(11) if mailed or electronically delivered prior to the date of consummation of the applicable Change of Control, that the Change of Control Offer is conditioned on the Change of Control Triggering Event occurring on or prior to the applicable Change of Control Payment Date.

“Change of Control Payment Date” has the meaning provided in the definition of “Change of Control.”

“Change of Control Triggering Event” means the occurrence of both a Change of Control and a Ratings Event.

“Collateral” means, collectively, “Collateral” (as defined in the Security Agreement) and all other property subject or purported to be subject from time to time to a Lien in favor of the Collateral Agent for its benefit and for the benefit of the Trustee and the Holders and the holders of any Pari Passu Junior Lien Obligations.

“Collateral Agent” means the Trustee, in its capacity as Collateral Agent under the Security Documents together with its successors in such capacity.

“Collateral Coverage Certificate” means with respect to any annual or quarterly financial statements provided pursuant to Section 4.02, a certificate signed by a financial officer of the Issuer setting forth an accurate calculation of the Borrowing Base as of the last day of the period covered by such annual or quarterly financial statements, a calculation of the principal amount of outstanding indebtedness for borrowed money on such date that is secured by Liens on the Collateral pursuant to clauses (2) and (3) of the definition of “Permitted Liens” and stating whether or not a Collateral Coverage Event has occurred.

“Collateral Coverage Event” shall be deemed to have occurred if, prior to a Fall-Away Event, as of the last day of any two consecutive fiscal quarters of the Issuer, the Borrowing Base as of each such day is less than the principal amount of the Issuer’s consolidated indebtedness for borrowed money outstanding on such day that is secured by Liens on the Collateral.

“Collateral Coverage Notice” has the meaning provided in the definition of “Collateral Coverage Offer.”

“Collateral Coverage Offer” means a written offer (a “Collateral Coverage Notice”) sent by or on behalf of the Issuer by first-class mail, postage prepaid, or by electronic delivery to each Holder, with a copy to the Trustee, at its address appearing in the register for the Notes on the date of the Collateral Coverage Offer offering to repurchase a portion (equal to \$2,000 or an integral multiple of \$1,000 in excess thereof) of such Holder’s Notes on the terms set forth hereunder up to an aggregate principal amount of Notes for all Holders equal to the Collateral Coverage Required Amount in accordance with Section 4.08. Unless otherwise required by applicable law, the Collateral Coverage Notice shall specify the payment date (the “Collateral Coverage Payment Date”) for the Collateral Coverage Offer, which shall be not less than 30 days nor more than 60 days after the date such Collateral Coverage Notice is mailed or electronically delivered. The Collateral Coverage Notice shall contain all the information required by applicable law to be included therein and shall describe the circumstances requiring such Collateral Coverage Offer. The Collateral Coverage Notice shall also state:

(1) that the Collateral Coverage Offer is being made pursuant to Section 4.08 of this Indenture;



- (2) the Collateral Coverage Payment Date;
- (3) the Collateral Coverage Event Payment;
- (4) that the Holder may tender all or any portion of the Notes registered in the name of such Holder and that any portion of a Note tendered must be tendered in denominations of \$2,000 principal amount or an integral multiple of \$1,000 in excess thereof, *provided* that in the event the aggregate principal amount of Notes validly tendered for purchase in the Collateral Coverage Offer exceeds the Collateral Coverage Required Amount for such Collateral Coverage Offer, the Issuer will accept for payment only the Collateral Coverage Required Amount of Notes on a *pro rata* basis from Holders who have validly tendered their Notes in such Collateral Coverage Offer (subject to rounding such that all remaining Notes are in a minimum principal amount of \$2,000 and in whole multiples of \$1,000 in excess thereof);
- (5) the place or places where Notes are to be surrendered for tender pursuant to the Collateral Coverage Offer;
- (6) that interest on any Note not tendered pursuant to the Collateral Coverage Offer will continue to accrue;
- (7) that on the Collateral Coverage Payment Date, the Collateral Coverage Event Payment will become due and payable upon each Note being accepted for payment pursuant to the Collateral Coverage Offer and that, unless the Issuer defaults in the payment of the Collateral Coverage Event Payment therefor, interest thereon shall cease to accrue on and after the Collateral Coverage Payment Date;
- (8) that each Holder electing to tender all or any portion of a Note pursuant to the Collateral Coverage Offer will, subject to Applicable Procedures, be required to surrender such Note, with the form entitled "Option of Holder to Elect Purchase" on the reverse of the Note completed, at the place or places specified in the Collateral Coverage Notice on or prior to the close of business on a date no earlier than the third Business Day prior to the Collateral Coverage Payment Date (such Note being, if the Issuer so requires, duly endorsed by, or accompanied by a written instrument of transfer in form satisfactory to the Issuer duly executed by, the Holder thereof or its attorney duly authorized in writing);
- (9) that Holders will, subject to Applicable Procedures, be entitled to withdraw all or any portion of Notes tendered if the Issuer receives, not later than the close of business on the fifth Business Day preceding the Collateral Coverage Payment Date, a facsimile transmission or letter setting forth the name of the Holder, the principal amount of the Note the Holder tendered, the certificate number of the Note the Holder tendered and a statement that such Holder is withdrawing all or a portion of its tender; and
- (10) that in the case of any Holder whose Note is purchased only in part, subject to Applicable Procedures, the Issuer shall execute and deliver to the Holder of such Note without service charge, a new Note or Notes, in an aggregate principal amount equal to and in exchange for the unpurchased portion of the Note so tendered, in denominations of \$2,000 principal amount or integral multiples of \$1,000 in excess thereof.

"Collateral Coverage Payment Date" has the meaning provided in the definition of "Collateral Coverage Offer."

“Collateral Coverage Required Amount” means, with respect to any Collateral Coverage Event, an amount equal to the difference between (a) the principal amount of the Issuer’s consolidated indebtedness for borrowed money that is secured by Liens on the Collateral outstanding on the date of occurrence of such Collateral Coverage Event and (b) the Borrowing Base on such date.

“Commission” means the Securities and Exchange Commission, as from time to time constituted, or, if at any time after the execution of this instrument such Commission is not existing and performing the duties now assigned to it under the Trust Indenture Act, then the body performing such duties on such date.

“Comparable Treasury Issue” means the United States Treasury security selected by an Independent Investment Banker as having a maturity comparable to the remaining term of the Notes to be redeemed that would be utilized, at the time of selection and in accordance with customary financial practice, in pricing new issues of corporate debt securities of comparable maturity to the remaining term of such Notes.

“Comparable Treasury Price” means, with respect to any Redemption Date, (1) the average of the Reference Treasury Dealer Quotations for such Redemption Date, after excluding the highest and lowest such Reference Treasury Dealer Quotations, or (2) if the Issuer obtains fewer than four such Reference Treasury Dealer Quotations, the average of all such Reference Treasury Dealer Quotations.

“Consolidated Net Tangible Assets” means the aggregate amount of the Issuer’s assets (less applicable reserves and other properly deductible items) and the Issuer’s Subsidiaries’ assets after deducting therefrom (a) all current liabilities (excluding current maturities of long-term debt and current maturities under capital leases) and (b) all goodwill, trade names, patents, unamortized debt discount and expense and other like intangibles, all as set forth on the Issuer’s most recent consolidated balance sheet and computed in accordance with GAAP.

“Continuing Directors” means, as of any date of determination, any member of the Board of Directors of the Issuer who (A) was a member of such Board of Directors on the Issue Date or (B) was nominated for election, elected or appointed to such Board of Directors with the approval of a majority of the continuing directors who were members of such Board of Directors at the time of such nomination, election or appointment (either by a specific vote or by approval of a proxy statement in which such member was named as a nominee for election as a director, without objection to such nomination).

“Credit Agreement” means the Amended and Restated Credit Agreement, dated as of May 21, 2009, among the Issuer, Sears Roebuck Acceptance Corp., Kmart Corporation, the financial institutions party thereto as lenders, Bank of America, N.A., as administrative agent, co-collateral agent and swingline lender, Wells Fargo Retail Finance, LLC, as co-collateral agent, and General Electric Capital Corporation, as co-collateral agent, together with the related documents thereto (including, without limitation, any guarantee agreements and security documents), in each case as such agreements may be amended (including any amendment and restatement thereof), supplemented or otherwise modified, replaced or refinanced from time to time, including any agreement extending the maturity of, refinancing, replacing or otherwise restructuring (including, without limitation, increasing the amount of available borrowings thereunder or adding Subsidiaries of the Issuer as additional borrowers or guarantors thereunder) all or any portion of the indebtedness under such agreement or any successor or replacement agreement or agreements and whether by the same or any other agent, lender or group of lenders.

“Credit Agreement Agent” means, collectively, the co-collateral agents under the Credit Agreement.

“Credit Agreement Obligations” means the Obligations owed to the lenders and agents under the Credit Agreement.

“Custodian” means any receiver, trustee, assignee, liquidator or similar official under any Bankruptcy Law.

“Default” means an Event of Default or an event that, with the giving of notice, the passage of time, or both, would constitute an Event of Default.

“Depository” means, with respect to the Notes issued in the form of one or more Global Notes, The Depository Trust Company or another Person designated as Depository by the Issuer, which Person must be a clearing agency registered under the Exchange Act.

“Depository Custodian” means the Trustee, as custodian of each Global Note for the Depository.

“Domestic Subsidiary” means any Subsidiary of the Issuer which is not a Foreign Subsidiary.

“Equity Interests” of any Person means any and all shares, interests, participations, rights in or other equivalents (however designated) of such Person’s Capital Stock, other equity interests whether now outstanding or issued after the Issue Date, partnership interests (whether general or limited), limited liability company interests, any other interest or participation that confers on a Person the right to receive a share of the profits and losses of, or distributions of assets of, the issuing Person, and any rights (other than debt securities convertible into Equity Interests), warrants or options exchangeable for or convertible into such Equity Interests.

“Exchange Act” means the Securities Exchange Act of 1934, as amended, and the rules and regulations of the Commission promulgated thereunder.

“Exchange Offer” has the meaning provided in the applicable Registration Rights Agreement.

“Exchange Securities” has the meaning provided in the applicable Registration Rights Agreement.

“Fall-Away Event” means the satisfaction of the following conditions on any date following the Issue Date: (i) the Issuer shall have a corporate family rating of at least Baa3 (or the equivalent) by Moody’s and BBB- (or the equivalent) by S&P, (ii) no Default shall have occurred and be continuing on such date, (iii) the Issuer and its Restricted Subsidiaries shall (after giving effect to the release of the Notes Liens and any concurrent release of Liens to occur on such date) have no Liens on any of their assets or properties other than Permitted Liens which are permitted to be outstanding following a Fall-Away Event and (iv) the Issuer shall have delivered to the Trustee an Officer’s Certificate certifying that the foregoing conditions are satisfied and requesting that the Notes Liens be released.

“Fitch” means Fitch Inc., a subsidiary of Fimalac, S.A., and its successors.

“Foreign Subsidiary” means any Subsidiary of the Issuer which is not organized under the laws of the United States or any state thereof or the District of Columbia, and any Subsidiary of any such Subsidiary.



“GAAP” means generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other entity as may be approved by a significant segment of the accounting profession of the United States, which are in effect from time to time.

“Government Securities” means securities that are (i) direct obligations of the United States for the payment of which its full faith and credit is pledged or (ii) obligations of a Person controlled or supervised by and acting as an agency or instrumentality of the United States, the timely payment of which is unconditionally guaranteed as a full faith and credit obligation by the United States, which, in either case under clause (i) or (ii), are not callable or redeemable at the option of the issuer thereof, and shall also include a depository receipt issued by a bank or trust company as custodian with respect to any such obligation or a specific payment of interest on or principal of any such obligation held by such custodian for the account of the holder of a depository receipt; *provided*, that (except as required by law) such custodian is not authorized to make any deduction from the amount payable to the holder of such depository receipt from any amount received by the custodian in respect of the obligation or the specific payment of interest on or principal of the obligation evidenced by such depository receipt.

“Guarantee” means a guarantee of the Notes on the terms set forth in this Indenture.

“Guarantor” means each Subsidiary or other Person that has provided a Guarantee for so long as such Guarantee remains in effect.

“Holder” means a Person in whose name a Note is registered.

“Indenture” means this Indenture as amended, restated or supplemented from time to time in accordance with the terms hereof.

“Independent Investment Banker” means one of the Reference Treasury Dealers appointed by the Issuer.

“Initial Purchasers” means Banc of America Securities LLC, Wells Fargo Securities, LLC, Barclays Capital Inc., Deutsche Bank Securities Inc., Goldman, Sachs & Co. and Citigroup Global Markets Inc.

“Initial Purchasers Registration Rights Agreement” means the registration rights agreement to be dated as of the Issue Date among the Issuer, the Guarantors and Banc of America Securities LLC, as representative of the Initial Purchasers, relating to the registration of the Notes with the Commission.

“Institutional Accredited Investor” means an institution that is an “accredited investor” as that term is defined in Rule 501(a)(1), (2), (3) or (7) promulgated under the Securities Act.

“Intercreditor Agreement” means, collectively, the intercreditor agreement dated as of the Issue Date by and among the Issuer, the Guarantors, the Collateral Agent and the Credit Agreement Agent and any other intercreditor agreement entered into in accordance with the terms hereof in connection with any Additional First Lien Obligations or Pari Passu Junior Lien Obligations.

“interest” means, with respect to the Notes, interest and Additional Interest, if any, on the Notes.

“Interest Payment Dates” means each April 15 and October 15, commencing April 15, 2011.

“Investment Grade Rating” means a rating equal to or higher than BBB- (or the equivalent) by Fitch, Baa3 (or the equivalent) by Moody’s and BBB- (or the equivalent) by S&P, and the equivalent investment grade credit rating from any replacement Rating Agency or Rating Agencies selected by the Issuer.

“Issue Date” means October 12, 2010.

“Issuer” has the meaning provided in the preamble hereof.

“Lien” means, with respect to any asset, any mortgage, lien (statutory or otherwise), pledge, hypothecation, charge, security interest, preference, priority or encumbrance of any kind in respect of such asset, whether or not filed, recorded or otherwise perfected under applicable law, including any conditional sale or other title retention agreement.

“Moody’s” means Moody’s Investors Service, Inc.

“Non-U.S. Person” means a Person who is not a U.S. person, as defined in Regulation S.

“Notes” means \$1,250.0 million of 6½% Senior Secured Notes due 2018, any Additional Notes issued under this Indenture and any Exchange Securities.

“Notes Liens” means the Liens securing the Obligations outstanding under the Notes and the Indenture.

“Obligations” means all obligations for principal, premium, interest (including any interest accruing subsequent to the filing of a petition of bankruptcy at the rate provided for in the documentation with respect thereto, whether or not such interest is an allowed claim under applicable law), penalties, fees, indemnifications, reimbursements, damages and other liabilities payable under the documentation governing any indebtedness.

“Officer” means the Chairman of the Board, the President, Chief Executive Officer, Chief Financial Officer, any Executive Vice President, the Treasurer, an Assistant Treasurer, the Secretary or an Assistant Secretary of the Issuer, or any direct or indirect parent of the Issuer, as applicable.

“Officer’s Certificate” means a certificate signed on behalf of the Issuer by the Chairman of the Board, President, Chief Executive Officer, Chief Financial Officer or Treasurer of the Issuer.

“Opinion of Counsel” means a written opinion reasonably satisfactory in form and substance to the Trustee from legal counsel, who may be an employee of or counsel to the Issuer or any Guarantor, or other counsel who is reasonably acceptable to the Trustee, stating the matters required by Section 12.05, if applicable, and delivered to the Trustee.

“Pari Passu Junior Lien Obligations” means any indebtedness of the Issuer or any Guarantor that is secured by a Lien on the Collateral equally and ratably with the Notes Liens and that is permitted to be incurred pursuant to clause (2) of the definition of “Permitted Liens”; *provided* that the representative of such Pari Passu Junior Lien Obligations executes a joinder agreement to the Security Agreement and the Intercreditor Agreement or enters into an additional intercreditor agreement with the Collateral Agent providing that any amounts received in respect of the Collateral in connection with an en-

forcement of the Notes Liens or the Liens securing such Pari Passu Junior Lien Obligations (or received in respect of such Liens in any bankruptcy or insolvency proceeding) shall, subject to the Intercreditor Agreement, after payment of expenses of the Collateral Agent and the collateral agent for each other class of Pari Passu Junior Lien Obligations, be distributed to the Trustee and each other agent for the holders of Pari Passu Junior Lien Obligations on a *pro rata* basis based on the amount of outstanding obligations of each such class. At the Issuer's option, any indebtedness secured by a Lien permitted by clause (2) of the definition of "Permitted Liens" may be Pari Passu Junior Lien Obligations.

"Pension Plan Registration Rights Agreement" means the registration rights agreement to be dated as of the Issue Date among the Issuer, the Guarantors and Sears Holdings Pension Trust relating to the registration of the Notes with the Commission.

"Permitted Holders" means (i) ESL Investments, Inc. and its Affiliates, (ii) any group (as defined in Rule 13d-3 under the Exchange Act) of which ESL Investments, Inc. or an Affiliate of ESL Investments, Inc. is a member so long as ESL Investments, Inc. and its Affiliates own a majority of the Issuer's Voting Stock owned by all members of such group and (iii) to the extent a Change of Control Triggering Event has occurred and a Change of Control Offer completed, any Person whose acquisition of the Issuer's Voting Stock caused such Change of Control Triggering Event and an Affiliate of such Person.

"Permitted Liens" means the following types of Liens:

(1) Liens existing as of the Issue Date (other than Liens securing indebtedness under the Credit Agreement);

(2) prior to the occurrence of a Fall-Away Event, Liens on the Collateral securing indebtedness (including indebtedness under the Credit Agreement) in an aggregate outstanding principal amount not to exceed an amount equal to the Borrowing Base (measured as of the end of the calendar month most recently ended prior to the date of any applicable incurrence of indebtedness) less the outstanding principal amount of Notes outstanding at such time, other than Additional Notes; *provided* that for purposes of this clause (2), Liens on Collateral securing (a) indebtedness under the Credit Agreement in a principal amount not to exceed \$2.45 billion shall be deemed to be Permitted Liens and (b) indebtedness under any other revolving credit facility shall be deemed to be Permitted Liens; *provided*, in the case of this clause (b), on the date firm commitments under such revolving credit facility are received by the Issuer and its Restricted Subsidiaries, indebtedness secured by Liens on the Collateral in the full amount of all firm commitments under each then existing revolving credit facility secured by Liens on the Collateral in reliance on this clause (2) (including commitments then outstanding under the Credit Agreement, if any) could have been incurred under this clause (2) had the full amount of such firm commitments been funded on such date;

(3) Liens securing the Notes and the Guarantees issued on the Issue Date (and any registered exchange notes and related guarantees issued in exchange therefore);

(4) Liens of the Issuer or a Subsidiary of the Issuer on assets of any Subsidiary of the Issuer;

(5) Liens for taxes, assessments or governmental charges or claims either (a) not delinquent or (b) contested in good faith by appropriate proceedings and as to which the Issuer or its Subsidiaries shall have set aside on its books such reserves as may be required pursuant to GAAP;

(6) statutory Liens of landlords and Liens of carriers, warehousemen, mechanics, suppliers, materialmen, repairmen, maritime and other Liens imposed by law incurred in the ordinary course of business for sums not yet delinquent or being contested in good faith, if such reserve or other appropriate provision, if any, as shall be required by GAAP shall have been made in respect thereof;

(7) Liens incurred or deposits made in the ordinary course of business in connection with workers' compensation, unemployment insurance and other types of social security, including any Lien securing letters of credit issued in the ordinary course of business consistent with past practice in connection therewith, or to secure the performance of tenders, statutory obligations, surety and appeal bonds, bids, leases, government contracts, performance and return-of-money bonds and other similar obligations or to secure or which results from required payments or deposits in connection with litigation (in each case, exclusive of obligations for the payment of borrowed money);

(8) judgment Liens so long as such Lien is adequately bonded and any appropriate legal proceedings which may have been duly initiated for the review of such judgment shall not have been finally terminated or the period within which such proceedings may be initiated shall not have expired;

(9) easements, rights-of-way, zoning restrictions and other similar charges or encumbrances in respect of real property not interfering in any material respect with the ordinary conduct of the business of the Issuer or any of its Subsidiaries;

(10) Liens upon specific items of inventory or other goods and proceeds of any Person securing such Person's obligations in respect of bankers' acceptances issued or created for the account of such Person to facilitate the purchase, shipment or storage of such inventory or other goods;

(11) Liens securing reimbursement obligations with respect to commercial letters of credit which encumber documents and other property relating to such letters of credit and products and proceeds thereof;

(12) Liens encumbering deposits made to secure obligations arising from statutory, regulatory, contractual, or warranty requirements of the Issuer or any of its Subsidiaries, including rights of offset and set-off;

(13) Liens securing indebtedness incurred to finance the purchase price or cost of construction of fixed or capital assets (or additions, substantial repairs, alterations or substantial improvements thereto) or of Equity Interests in a third party, *provided* that (x) such Liens and the indebtedness secured thereby are incurred within twelve months of the later of acquisition or completion of construction (or addition, repair, alteration or improvement) and full operation thereof and (y) such Liens extend only to the assets the acquisition, construction, repair, replacement or improvement of which is financed thereby or, in the case of an acquisition of Equity Interests in a third party which becomes a Subsidiary as a result of such acquisition, the assets owned by such third party;

(14) Liens on the assets, property or Capital Stock of a Person at the time such Person becomes a Restricted Subsidiary; *provided*, that such Liens are not created or incurred in connection with, or in contemplation of, such other Person becoming a Restricted Subsidiary; *provided*,



*further*, that such Liens do not extend to any property owned by the Issuer or any other Restricted Subsidiary;

(15) Liens on assets or property existing at the time the Issuer or a Restricted Subsidiary acquired such assets or property, including by means of merger, amalgamation or consolidation with or into the Issuer or a Restricted Subsidiary; *provided*, that such Liens are not created or incurred in connection with, or in contemplation of, such other Person becoming a Restricted Subsidiary; *provided, further*, that such Liens do not extend to any other property owned by the Issuer or any Restricted Subsidiary;

(16) Liens to secure obligations in respect of Cash Management Services and Bank Products (each as defined in the Credit Agreement); and

(17) from and after the occurrence of a Fall-Away Event, other Liens on property owned by the Issuer or any of its Subsidiaries securing indebtedness having an aggregate principal amount not to exceed, as of any date of incurrence of such secured indebtedness pursuant to this clause and after giving effect to such incurrence and the application of the proceeds therefrom, 15% of the Issuer's Consolidated Net Tangible Assets as of the last day of the most recent fiscal quarter for which financial statements have been delivered pursuant to Section 4.02.

"Person" means any individual, partnership, corporation, limited liability company, joint stock company, business trust, trust, unincorporated association, joint venture or other entity, or a government or political subdivision or agency thereof.

"Physical Notes" means certificated Notes in registered form that are not registered in the name of the Depository or its nominee in substantially the form set forth in Exhibit A.

"Primary Treasury Dealer" has the meaning provided in the definition of "Reference Treasury Dealers".

"Private Placement Legend" means the legend initially set forth on the Rule 144A Notes and other Notes that are Restricted Notes in the form set forth in Exhibit B.

"Qualified Institutional Buyer" or "QIB" shall have the meaning specified in Rule 144A promulgated under the Securities Act.

"Rating Agencies" means (1) each of Fitch, Moody's and S&P; and (2) if Fitch, Moody's or S&P ceases to rate the Notes or fails to make a rating of the Notes publicly available, at the sole option of the Issuer, a "nationally recognized statistical rating organization" as defined in Section 3 of the Exchange Act, selected by the Issuer (as certified by a resolution of the Board of Directors of the Issuer) as a replacement agency for Fitch, Moody's or S&P, or any of them, as the case may be.

"Ratings Event" means that the rating on the Notes is lowered by at least two of the three Rating Agencies and the Notes are rated below an Investment Grade Rating by at least two of the three Rating Agencies (it being understood that for purposes of this definition if fewer than three Rating Agencies maintain ratings of the Notes at the time of a Change of Control, the Notes will be deemed for purposes of this definition to have been downgraded in connection with such Change of Control (prior to any actual downgrades) by a number of Rating Agencies equal to the excess of 3 over the number of Rating Agencies that maintain ratings of the Notes at such time), on any day during the period (which period will be extended so long as the rating of the Notes is under publicly announced consideration for a possible downgrade by any of the Rating Agencies) commencing 60 days prior to the first public notice of the oc-

currence of a Change of Control or the Issuer's intention to effect a Change of Control and ending 60 days following consummation of such Change of Control.

"Redemption Date" when used with respect to any Note to be redeemed means the date fixed for such redemption pursuant to the terms of the Notes.

"Reference Treasury Dealers" means (1) Banc of America Securities LLC and its successors; *provided, however*, that if any of the foregoing shall cease to be a primary Government Securities dealer (a "Primary Treasury Dealer"), the Issuer shall substitute another nationally recognized investment banking firm that is a Primary Treasury Dealer, and (2) two other Primary Treasury Dealers selected by the Issuer.

"Reference Treasury Dealer Quotations" means, with respect to each Reference Treasury Dealer and any Redemption Date, the average, as determined by the Issuer, of the bid and asked prices for the Comparable Treasury Issue (expressed in each case as a percentage of its principal amount) quoted in writing to the Issuer by such Reference Treasury Dealer at 5:00 p.m. on the third Business Day preceding such Redemption Date.

"Registration Rights Agreement" means the Initial Purchasers Registration Rights Agreement or the Pension Plan Registration Rights Agreement, as applicable and "Registration Rights Agreement" means, collectively, the Initial Purchasers Registration Rights Agreement and the Pension Plan Registration Rights Agreement.

"Regulation S" means Regulation S promulgated under the Securities Act.

"Regulation S-X" means Regulation S-X promulgated under the Securities Act.

"Responsible Officer" when used with respect to the Trustee, means an officer or assistant officer assigned to the Corporate Trust Services department of the Trustee (or any successor group of the Trustee) with direct responsibility for the administration of this Indenture or the Security Documents and also means, with respect to a particular corporate trust matter, any other officer to whom such matter is referred because of his knowledge of and familiarity with the particular subject.

"Restricted Note" has the same meaning as "Restricted Security" set forth in Rule 144(a)(3) promulgated under the Securities Act; *provided* that the Trustee shall be entitled to request and conclusively rely upon an Opinion of Counsel with respect to whether any Note is a Restricted Note.

"Restricted Subsidiary" means each Domestic Subsidiary of the Issuer other than Orchard Supply Hardware Stores Corporation and its Subsidiaries.

"Rule 144" means Rule 144 promulgated under the Securities Act.

"Rule 144A" means Rule 144A promulgated under the Securities Act.

"S&P" means Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc.

"Securities Act" means the Securities Act of 1933, as amended, and the rules and regulations of the Commission promulgated thereunder.

“Security Agreement” means the security agreement dated as of the Issue Date among the Collateral Agent, the Issuer and the Grantors (as defined therein).

“Security Documents” means the Security Agreement, the Intercreditor Agreement and each other document entered into to grant a security interest in the Collateral to the Collateral Agent for the benefit of the Holders of Notes.

“Specified Subsidiary” means any wholly-owned Restricted Subsidiary with Credit Card Accounts Receivable (as defined in the Security Agreement and for purposes of such definition, substituting the words “Domestic Subsidiary” for “Guarantor” in each instance where such term is used) and Inventory (as defined in the Security Agreement) the combined book value of which exceeds \$100.0 million and which has incurred indebtedness for money borrowed in excess of \$100.0 million.

“Subsidiary” means a corporation, a majority of the outstanding Voting Stock of which is owned, directly or indirectly, by the Issuer or by one or more other Subsidiaries, or by the Issuer and one or more other Subsidiaries.

“Treasury Rate” means, with respect to any Redemption Date, the rate per annum equal to the semi-annual equivalent yield to a maturity of the Comparable Treasury Issue, assuming a price for the Comparable Treasury Issue (expressed as a percentage of its principal amount) equal to the Comparable Treasury Price for such Redemption Date.

“Trust Indenture Act” or “TIA” means the Trust Indenture Act of 1939, as amended.

“Trustee” means the party named as such above until a successor replaces it in accordance with the applicable provisions of this Indenture, and thereafter means the successor serving hereunder.

“UCC” means the Uniform Commercial Code as in effect from time to time in the State of New York; *provided, however*, that, at any time, if by reason of mandatory provisions of law, any or all of the perfection or priority of the Collateral Agent’s security interest in any item or portion of the Collateral is governed by the Uniform Commercial Code as in effect in a jurisdiction other than the State of New York, the term “UCC” shall mean the Uniform Commercial Code as in effect, at such time, in such other jurisdiction for purposes of the provisions hereof relating to such perfection or priority and for purposes of definitions relating to such provisions.

“Voting Stock” means, with respect to any specified Person as of any date, the Capital Stock of such Person that is at the time entitled to vote generally in the election of the board of directors or comparable governing body of such Person.

#### SECTION 1.02. Other Definitions.

The definitions of the following terms may be found in the sections indicated as follows:

<u>Term</u>	<u>Defined in Section</u>
“Agent Members”	2.16(a)
“Authentication Order”	2.01
“Business Day”	12.07
“Change of Control Payment”	4.07
“Collateral Coverage Event Payment”	4.08
“Covenant Defeasance”	9.03



"Event of Default"	6.01
"Global Notes"	2.16(a)
"Institutional Accredited Investor Notes"	2.02
"Legal Defeasance"	9.02
"Legal Holiday"	12.07
"Paying Agent"	2.04
"Registrar"	2.04
"Regulation S Global Note"	2.16(a)
"Regulation S Notes"	2.02
"Restricted Global Note"	2.16(a)
"Restricted Period"	2.16(f)
"Rule 144A Notes"	2.02
"Sale and Leaseback Transaction"	4.05(a)

SECTION 1.03. Incorporation by Reference of Trust Indenture Act.

Whenever this Indenture refers to a provision of the TIA, the portion of such provision required to be incorporated herein in order for this Indenture to be qualified under the TIA is incorporated by reference in and made a part of this Indenture. The following TIA terms used in this Indenture have the following meanings:

"indenture securities" means the Notes and the Guarantees.

"indenture securityholder" means a Holder.

"indenture to be qualified" means this Indenture.

"indenture trustee" or "institutional trustee" means the Trustee.

"obligor on the indenture securities" means the Issuer, the Guarantors or any other obligor on the Notes.

All other terms used in this Indenture that are defined by the TIA, defined in the TIA by reference to another statute or defined by Commission rule have the meanings therein assigned to them.

SECTION 1.04. Rules of Construction.

Unless the context otherwise requires:

- (1) a term has the meaning assigned to it herein, whether defined expressly or by reference;
- (2) "or" is not exclusive;
- (3) words in the singular include the plural, and in the plural include the singular;
- (4) words used herein implying any gender shall apply to both genders;
- (5) "herein," hereof" and other words of similar import refer to this Indenture as a whole and not to any particular Article, Section or Subsection;

(6) unless otherwise specified herein, all accounting terms used herein shall be interpreted, all accounting determinations hereunder shall be made, and all financial statements required to be delivered hereunder shall be prepared in accordance with GAAP;

(7) “\$,” “U.S. Dollars” and “United States Dollars” each refer to United States dollars, or such other money of the United States that at the time of payment is legal tender for payment of public and private debts;

(8) the words “including,” “includes” and similar words shall be deemed to be followed by “without limitation”; and

(9) references to sections of or rules under the Securities Act, the Exchange Act and the TIA shall be deemed to include substitute, replacement or successor sections or rules adopted by the Commission from time to time.

## ARTICLE TWO

### THE NOTES

#### SECTION 2.01. Amount of Notes.

The Trustee shall, upon the receipt of a written order of the Issuer signed by an Officer of the Issuer (an “Authentication Order”), the applicable Notes duly executed by the Issuer, and the notation of Guarantee to be endorsed thereon duly executed by each Guarantor, authenticate (i) Notes for original issue on the Issue Date in the aggregate principal amount not to exceed \$1,250,000,000 and (ii) Additional Notes in an unlimited principal amount, to the extent permitted by Section 4.04. The Authentication Order shall specify the amount of Notes to be authenticated, the date on which the Notes are to be authenticated, and the names and delivery instructions for each Holder of the Notes. Furthermore, Notes may be authenticated or delivered upon registration or transfer, or in lieu of, other Notes pursuant to Section 2.07, 2.08, 2.11, 3.06 or 8.05 or in connection with a Change of Control Offer pursuant to Section 4.07 or Collateral Coverage Offer pursuant to Section 4.08. The Trustee shall be entitled to receive an Opinion of Counsel of the Issuer and the Guarantors in connection with such authentication of Notes that this Indenture will constitute valid and legally binding obligations of the Issuer and the Guarantors, and that such Notes, when duly authorized and executed by the Issuer and duly authenticated by the Trustee in the manner provided in this Indenture and delivered against payment of the purchase price therefor, will constitute valid and binding obligations of the Issuer, and that the Guarantees, when duly authorized and executed by the Guarantors, will constitute valid and binding obligations of such Guarantors, enforceable in accordance with their terms, subject to (i) bankruptcy, insolvency, fraudulent conveyance, fraudulent transfer, reorganization, moratorium or other similar laws relating to or affecting the rights or remedies of creditors generally, (ii) the application of general principles of equity, and (iii) applicable law and public policy with respect to rights to indemnity and contribution.

Upon receipt of an Authentication Order, the Trustee shall authenticate Notes in substitution for Notes originally issued to reflect any name change of the Issuer. Any Additional Notes shall be part of the same issue as the Notes being issued on the Issue Date and will vote on all matters as one class with the Notes being issued on the Issue Date, including, without limitation, waivers, amendments, redemptions and offers to purchase. For the purposes of this Indenture, references to the Notes include Additional Notes, if any.

Upon receipt of an Authentication Order, the applicable Notes duly executed by the Issuer, the notation of Guarantee to be endorsed thereon duly executed by each Guarantor, and an Officer’s

Certificate certifying that a registration statement relating to an exchange offer specified in the applicable Registration Rights Agreement or any registration rights agreement relating to the Additional Notes is effective, the Trustee shall authenticate an additional series of Notes for issuance in exchange for the Notes tendered for exchange pursuant to such exchange offer registered under the Securities Act. Exchange Securities may have such distinctive series designations and such changes in the form thereof as are specified in the Authentication Order referred to in the preceding sentence.

The principal of, premium, if any, and interest, if any, on the Notes shall be payable at the office or agency of the Issuer maintained for such purpose in the Borough of Manhattan, the City of New York, State of New York, or at such other office or agency of the Issuer as may be maintained for such purpose pursuant to Section 2.04; *provided, however*, that, at the option of the Issuer, each installment of interest may be paid by (i) check mailed to addresses of the Persons entitled thereto as such addresses shall appear on the registry maintained by the Registrar or (ii) wire transfer to an account located in the United States maintained by the payee. Payments in respect of Notes represented by a Global Note (including principal, premium, if any, and interest) will be made by wire transfer of immediately available funds to the accounts specified by the Depository. If Additional Interest is payable on the Notes, the Issuer shall provide an Officer's Certificate to the Trustee on or before the record date for each Interest Payment Date on which such Additional Interest is payable setting forth the amount of such Additional Interest in reasonable detail. The Trustee may provide a copy of such Officer's Certificate or other notice received from the Issuer relating to Additional Interest to any Holder upon request.

#### SECTION 2.02. Form and Dating.

The Notes and the Trustee's certificate of authentication with respect thereto shall be substantially in the form set forth in Exhibit A, which is incorporated in and forms a part of this Indenture. The Notes may have notations, legends or endorsements required by law, rule or usage to which the Issuer is subject. Without limiting the generality of the foregoing, Notes offered and sold to Qualified Institutional Buyers in reliance on Rule 144A ("Rule 144A Notes") and Notes offered and sold to Institutional Accredited Investors ("Institutional Accredited Investor Notes") shall bear the legend and include the form of assignment set forth in Exhibit B, and Notes offered and sold in offshore transactions in reliance on Regulation S ("Regulation S Notes") shall bear the legend and include the form of assignment set forth in Exhibit C. The Issuer shall approve the form of the Notes and any notation, legend or endorsement on them. Each Note shall be dated the date of its authentication.

The terms and provisions contained in the Notes shall constitute, and are expressly made, a part of this Indenture and, to the extent applicable, the Issuer, the Guarantors and the Trustee, by their execution and delivery of this Indenture, expressly agree to such terms and provisions and agree to be bound thereby. However, to the extent any provision of any Note conflicts with the express provisions of this Indenture, the provisions of this Indenture shall govern and be controlling.

The Notes may be presented for registration of transfer and exchange at the offices of the Registrar.

#### SECTION 2.03. Execution and Authentication.

At least one Officer shall sign the Notes for the Issuer by manual or facsimile signature.

If an Officer whose signature is on a Note was an Officer at the time of such execution but no longer holds that office at the time the Trustee authenticates the Note, the Note shall be valid nevertheless.

No Note shall be entitled to any benefit under this Indenture or be valid or obligatory for any purpose unless there appears on such Note a certificate of authentication substantially in the form provided for herein executed by the Trustee by manual or facsimile signature, and such certificate upon any Note shall be conclusive evidence, and the only evidence, that such Note has been duly authenticated and delivered hereunder. Notwithstanding the foregoing, if any Note shall have been authenticated and delivered hereunder but never issued and sold by the Issuer, and the Issuer shall deliver such Note to the Trustee for cancellation as provided in Section 2.12, for all purposes of this Indenture such Note shall be deemed never to have been authenticated and delivered hereunder and shall never be entitled to the benefits of this Indenture.

The Trustee may appoint an authenticating agent reasonably acceptable to the Issuer to authenticate the Notes. Unless otherwise provided in the appointment, an authenticating agent may authenticate the Notes whenever the Trustee may do so. Each reference in this Indenture to authentication by the Trustee includes authentication by such agent. An authenticating agent has the same rights as an Agent to deal with the Issuer and Affiliates of the Issuer. Each Paying Agent is designated as an authenticating agent for purposes of this Indenture.

The Notes shall be issuable only in registered form without coupons in denominations of \$2,000 principal amount and integral multiples of \$1,000 in excess thereof.

#### SECTION 2.04. Registrar and Paying Agent.

The Issuer shall maintain an office or agency where Notes may be presented for registration of transfer or for exchange (the “Registrar”), and an office or agency where Notes may be presented for payment (the “Paying Agent”) and an office or agency where notices and demands to or upon the Issuer, if any, in respect of the Notes and this Indenture may be served. The Registrar shall keep a register of the Notes and of their transfer and exchange. The Issuer may have one or more additional Paying Agents. The term “Paying Agent” includes any additional Paying Agent. The Issuer may remove any Registrar or Paying Agent upon written notice to such Registrar or Paying Agent and the Trustee.

The Issuer shall enter into an appropriate agency agreement, which shall incorporate the provisions of the TIA, with any Agent that is not a party to this Indenture. The agreement shall implement the provisions of this Indenture that relate to such Agent. The Issuer shall notify the Trustee of the name and address of any such Agent. If the Issuer fails to maintain a Registrar or Paying Agent, or fails to give the foregoing notice, the Trustee shall act as such and shall be entitled to appropriate compensation in accordance with Section 7.01(a). The Issuer or any of its Subsidiaries may act as Paying Agent, Registrar, co-registrar or transfer agent.

The Issuer initially appoints the Trustee as Registrar, Paying Agent and Agent for service of notices and demands in connection with the Notes and this Indenture and the Corporate Trust Office of the Trustee as its office for purposes of this Section 2.04.

#### SECTION 2.05. Paying Agent To Hold Money in Trust.

Prior to 10:00 a.m., New York City time, on each due date of the principal or interest on any Notes, the Issuer shall deposit with the Paying Agent a sum sufficient to pay such principal and interest when so becoming due. Each Paying Agent shall hold in trust for the benefit of the Holders or the Trustee all money held by the Paying Agent for the payment of principal of or premium or interest on the Notes (whether such money has been paid to it by the Issuer or any other obligor on the Notes or the Guarantors), and the Issuer and the Paying Agent shall notify the Trustee of any default by the Issuer (or any other obligor on the Notes) in making any such payment. If the Issuer or a Subsidiary of the Issuer



serves as Paying Agent, it shall segregate the money held by it as Paying Agent and hold it as a separate trust fund. Money held in trust by the Paying Agent need not be segregated except as required by law and in no event shall the Paying Agent be liable for any interest on any money received by it hereunder. The Issuer at any time may require the Paying Agent to pay all money held by it to the Trustee and account for any funds disbursed and the Trustee may at any time during the continuance of any Event of Default specified in clause (1) or (2) of Section 6.01, upon written request to the Paying Agent, require such Paying Agent to pay forthwith all money so held by it to the Trustee and to account for any funds disbursed by the Paying Agent. Upon making such payment, the Paying Agent shall have no further liability for the money delivered to the Trustee.

SECTION 2.06. Holder Lists.

The Trustee shall preserve in as current a form as is reasonably practicable the most recent list available to it of the names and addresses of the Holders. If the Trustee is not the Registrar, the Issuer shall furnish to the Trustee at least two Business Days before each Interest Payment Date, and at such other times as the Trustee may reasonably request in writing, a list in such form and as of such date as the Trustee may reasonably require of the names and addresses of the Holders.

SECTION 2.07. Transfer and Exchange.

Subject to Sections 2.16 and 2.17, when Notes are presented to the Registrar with a request from the Holder of such Notes to register a transfer or to exchange them for an equal principal amount of Notes of other authorized denominations, the Registrar shall register the transfer or exchange such notes as requested if the requirements of this Indenture are met. Every Note presented or surrendered for registration of transfer or exchange shall be duly endorsed or be accompanied by a written instrument of transfer in form satisfactory to the Issuer and the Registrar, duly executed by the Holder thereof or his attorneys duly authorized in writing. To permit registrations of transfers and exchanges, the Issuer shall issue and execute and the Trustee shall authenticate new Notes (and the Guarantors shall execute the notation of Guarantee thereon) evidencing such transfer or exchange at the Registrar's request. No service charge shall be made to the Holder for any registration of transfer or exchange. The Issuer may require from the Holder payment of a sum sufficient to cover any transfer taxes or other governmental charge that may be imposed in relation to a transfer or exchange, but this provision shall not apply to any exchange pursuant to Section 2.11, 3.06, 4.07, 4.08 or 8.05 (in which events the Issuer shall be responsible for the payment of such taxes). The Registrar shall not be required to exchange or register a transfer of any Note for a period of 15 days immediately preceding the mailing or electronic delivery of notice of redemption of Notes to be redeemed or of any Note selected, called or being called for redemption except the unredeemed portion of any Note being redeemed in part.

Any Holder of the Global Note shall, by acceptance of such Global Note, agree that transfers of the beneficial interests in such Global Note may be effected only through a book entry system maintained by the Holder of such Global Note (or its agent), and that ownership of a beneficial interest in the Global Note shall be required to be reflected in a book entry.

Each Holder of a Note agrees to indemnify the Issuer, the Guarantors and the Trustee against any liability that may result from the transfer, exchange or assignment of such Holder's Note in violation of any provision of this Indenture and/or applicable federal or state securities law.

Except as expressly provided herein, neither the Trustee nor the Registrar shall have any duty to monitor the Issuer's compliance with or have any responsibility with respect to the Issuer's compliance with any federal or state securities laws. The Trustee shall have no obligation or duty to monitor, determine or inquire as to compliance with any restrictions on transfer imposed under this Indenture or

under applicable law with respect to any transfer of any interest in any Notes (including any transfers between or among the Depository's participants or beneficial owners of interests in any Global Note) other than to require delivery of such certificates and other documentation, as is expressly required by, and to do so if and when expressly required by, the terms of this Indenture and to examine the same to determine substantial compliance as to form with the express requirements hereof.

SECTION 2.08. Replacement Notes.

If a mutilated Note is surrendered to the Registrar or the Trustee, or if the Holder of a Note claims that the Note has been lost, destroyed or wrongfully taken, the Issuer shall issue and the Trustee shall authenticate a replacement Note (and the Guarantors shall execute the notation of Guarantee thereon) if the Holder of such Note furnishes to the Issuer and the Trustee evidence reasonably acceptable to them of the ownership and the destruction, loss or theft of such Note and if the requirements of Section 8-405 of the UCC are met. If required by the Trustee or the Issuer, an indemnity bond shall be posted by such Holder, sufficient in the judgment of both to protect the Issuer, the Guarantors, the Trustee or any Paying Agent from any loss that any of them may suffer if such Note is replaced. The Issuer and the Trustee may charge such Holder for their reasonable out-of-pocket expenses in replacing such Note (including, without limitation, attorneys' fees and disbursements). Every replacement Note shall constitute a contractual Obligation of the Issuer.

SECTION 2.09. Outstanding Notes.

The Notes outstanding at any time are all Notes that have been authenticated by the Trustee except for (a) those cancelled by it, (b) those delivered to it for cancellation, (c) to the extent set forth in Sections 9.01 and 9.02, on or after the date on which the conditions set forth in Section 9.01 or 9.02 have been satisfied, those Notes theretofore authenticated and delivered by the Trustee hereunder and (d) those described in this Section 2.09 as not outstanding. Subject to Section 2.10, a Note does not cease to be outstanding because the Issuer or one of its Affiliates holds the Note.

If a Note is replaced pursuant to Section 2.08, it ceases to be outstanding unless the Trustee and the Issuer receives proof satisfactory to it that the replaced Note is held by a bona fide purchaser in whose hands such Note is a legal, valid and binding obligation of the Issuer. A mutilated Note ceases to be outstanding upon surrender of such Note and replacement thereof pursuant to Section 2.08.

If the principal of any Note is considered paid under Section 4.01, it shall cease to be outstanding and interest thereon shall cease to accrue. If the Paying Agent holds, on any Redemption Date or maturity date, money sufficient to pay all accrued interest and principal with respect to the Notes payable on that date and is not prohibited from paying such money to the Holders thereof pursuant to the terms of this Indenture, then on and after that date such Notes cease to be outstanding and interest on them ceases to accrue.

SECTION 2.10. Treasury Notes.

In determining whether the Holders of the required principal amount of Notes have concurred in any declaration of acceleration or notice of default or direction, waiver or consent or any amendment, modification or other change to this Indenture, Notes owned by the Issuer or any Affiliate of the Issuer shall be disregarded as though they were not outstanding, except that for the purposes of determining whether the Trustee shall be protected in relying on any such direction, waiver or consent or any amendment, modification or other change to this Indenture, only Notes as to which a Responsible Officer of the Trustee has received an Officer's Certificate stating that such Notes are so owned shall be so disregarded. Notes so owned which have been pledged in good faith shall not be disregarded if the pledgee

established to the satisfaction of the Trustee the pledgee's right so to act with respect to the Notes and that the pledgee is not the Issuer, a Guarantor, any other obligor on the Notes or any of their respective Affiliates.

SECTION 2.11. Temporary Notes.

Until definitive Notes are prepared and ready for delivery, the Issuer may prepare and the Trustee shall authenticate temporary Notes. Temporary Notes shall be substantially in the form of definitive Notes but may have variations that the Issuer considers appropriate for temporary Notes. Without unreasonable delay, the Issuer shall prepare and the Trustee shall authenticate definitive Notes in exchange for temporary Notes. Until such exchange, temporary Notes shall be entitled to the same rights, benefits and privileges as definitive Notes.

SECTION 2.12. Cancellation.

The Issuer at any time may deliver Notes to the Trustee for cancellation. The Registrar and the Paying Agent shall forward to the Trustee any Notes surrendered to them for registration of transfer, exchange or payment. The Trustee and no one else shall cancel all Notes surrendered for registration of transfer, exchange, payment, replacement or cancellation and shall (subject to the record-retention requirements of the Exchange Act) dispose of such cancelled Notes in its customary manner. The Trustee shall deliver a certificate of such disposal to the Issuer upon its request therefor. The Issuer may not reissue or resell, or issue new Notes to replace, Notes that the Issuer has redeemed or paid, or that have been delivered to the Trustee for cancellation.

SECTION 2.13. Defaulted Interest.

If the Issuer defaults on a payment of interest on the Notes, it shall pay the defaulted interest, plus (to the extent permitted by law) any interest payable on the defaulted interest, in accordance with the terms hereof, to the Persons who are Holders on a subsequent special record date, which date shall be at least five Business Days prior to the payment date. The Issuer shall fix such special record date and payment date in a manner satisfactory to the Trustee. The Issuer shall promptly mail or electronically deliver to each Holder a notice that states the special record date, the payment date and the amount of defaulted interest, and interest payable on defaulted interest, if any, to be paid. The Issuer may make payment of any defaulted interest in any other lawful manner not inconsistent with the requirements (if applicable) of any securities exchange on which the Notes may be listed and, upon such notice as may be required by such exchange, if, after written notice given by the Issuer to the Trustee of the proposed payment pursuant to this sentence, such manner of payment shall be deemed practicable by the Trustee.

SECTION 2.14. CUSIP Number.

The Issuer in issuing the Notes may use a "CUSIP" number, ISIN and "Common Code" number (in each case if then generally in use), and if so, such CUSIP number, ISIN and Common Code number shall be included in notices, including notices of redemption or exchange as a convenience to Holders; *provided* that any such notice may state that no representation is made as to the correctness or accuracy of such number either as printed in the notice or on the Notes, and that reliance may be placed only on the other identification numbers printed on the Notes. The Issuer shall promptly notify the Trustee of any such CUSIP number, ISIN and Common Code number used by the Issuer in connection with the issuance of the Notes and of any change in the CUSIP number, ISIN and Common Code number.



SECTION 2.15. Deposit of Moneys.

Prior to 10:00 a.m., New York City time, on each Interest Payment Date, maturity date, Change of Control Payment Date and Collateral Coverage Payment Date, as the case may be, the Issuer shall have deposited with the Paying Agent in immediately available funds money sufficient to make cash payments, if any, due on such Interest Payment Date, maturity date, Change of Control Payment Date and Collateral Coverage Payment Date, as the case may be. The principal and interest on Global Notes shall be payable to the Depository or its nominee, as the case may be, as the sole registered owner and the sole holder of the Global Notes represented thereby in accordance with Applicable Procedures. The principal and interest on Physical Notes shall be payable, either in person or by mail, at the office of the Paying Agent and further in connection with the payment of principal, upon presentment of such Physical Notes at the office of the Paying Agent.

SECTION 2.16. Book-Entry Provisions for Global Notes.

(a) Rule 144A Notes and Institutional Accredited Investor Notes initially shall be represented by notes in registered, global form without interest coupons (collectively, the “Restricted Global Notes”). Regulation S Notes initially shall be represented by one or more notes in registered, global form without interest coupons (collectively, the “Regulation S Global Notes,” and, together with the Restricted Global Note and any other global notes representing Notes, the “Global Notes”). The Global Notes shall bear legends as set forth in Exhibit D. The Global Notes initially shall (i) be registered in the name of the Depository or the nominee of such Depository, in each case for credit to an account of an Agent Member, (ii) be delivered to the Depository Custodian and (iii) bear legends as set forth in Exhibit B with respect to Restricted Global Notes and Exhibit C with respect to Regulation S Global Notes.

Members of, or direct or indirect participants in, the Depository (“Agent Members”) shall have no rights under this Indenture with respect to any Global Note held on their behalf by the Depository, or the Depository Custodian, or under the Global Notes, and the Depository may be treated by the Issuer, the Trustee and any agent of the Issuer or the Trustee as the absolute owner of the Global Note for all purposes whatsoever. Notwithstanding the foregoing, nothing herein shall prevent the Issuer, the Trustee or any agent of the Issuer or the Trustee from giving effect to any written certification, proxy or other authorization furnished by the Depository or impair, as between the Depository and its Agent Members, the operation of customary practices governing the exercise of the rights of a Holder of any Note.

(b) Transfers of Global Notes shall be limited to transfers in whole, but not in part, to the Depository, its successors or their respective nominees. Subject to Section 2.16(e), interests of beneficial owners in the Global Notes may be transferred or exchanged for Physical Notes in accordance with the rules and procedures of the Depository and the provisions of Section 2.17. In addition, subject to Section 2.16(e), a Global Note shall be exchangeable for Physical Notes if (i) the Depository (x) notifies the Issuer that it is unwilling or unable to continue as depository for such Global Note and the Issuer thereupon fails to appoint a successor depository within 90 days thereof or (y) has ceased to be a clearing agency registered under the Exchange Act and the Issuer thereupon fails to appoint a successor depository within 90 days thereof or (ii) there shall have occurred and be continuing an Event of Default with respect to the Notes and the Depository shall have requested the issuance of Physical Notes. In all cases, Physical Notes delivered in exchange for any Global Note or beneficial interests therein shall be registered in the names, and issued in any approved denominations, requested by or on behalf of the Depository (in accordance with Applicable Procedures).

(c) In connection with any transfer or exchange of a portion of the beneficial interest in any Global Note to beneficial owners pursuant to paragraph (b), the Registrar shall (if one or more Physical Notes are to be issued) reflect on its books and records the date and a decrease in the principal

amount of the Global Note in an amount equal to the principal amount of the beneficial interest in the Global Note to be transferred, and the Issuer shall execute, and the Trustee shall upon receipt of an Authentication Order from the Issuer authenticate and make available for delivery, one or more Physical Notes of like tenor and amount.

(d) In connection with the transfer of Global Notes as an entirety to beneficial owners pursuant to paragraph (b), the Global Notes shall be deemed to be surrendered to the Trustee for cancellation, and the Issuer shall execute, and the Trustee shall authenticate and deliver, to each beneficial owner identified by the Depository in writing in exchange for its beneficial interest in the Global Notes, an equal aggregate principal amount of Physical Notes of authorized denominations.

(e) Any Physical Note constituting a Restricted Note delivered in exchange for an interest in a Global Note pursuant to paragraph (b), shall, except as otherwise provided by paragraphs (a)(i)(x) and (c) of Section 2.17, bear the Private Placement Legend or, in the case of the Regulation S Global Note, the legend set forth in Exhibit C, in each case, unless the Issuer determines otherwise in compliance with applicable law.

(f) On or prior to the 40th day after the later of the commencement of the offering of the Notes represented by the Regulation S Global Note and the issue date of such Notes (such period through and including such 40th day, the "Restricted Period"), a beneficial interest in a Regulation S Global Note may be transferred to a Person who takes delivery in the form of an interest in the corresponding Restricted Global Note only upon receipt by the Trustee of a written certification from the transferor to the effect that such transfer is being made (i)(a) to a Person whom the transferor reasonably believes is a Qualified Institutional Buyer in a transaction meeting the requirements of Rule 144A or (b) pursuant to another exemption from the registration requirements under the Securities Act which is accompanied by an Opinion of Counsel reasonably satisfactory to the Issuer and the Trustee regarding the availability of such exemption and (ii) in accordance with all applicable securities laws of any state of the United States or any other jurisdiction. During the Restricted Period, a beneficial interest in the Regulation S Global Note may not be exchanged for a Physical Note.

(g) Beneficial interests in the Restricted Global Note may be transferred to a Person who takes delivery in the form of an interest in the Regulation S Global Note, whether before or after the expiration of the Restricted Period, only if the transferor first delivers to the Trustee a written certificate to the effect that such transfer is being made in accordance with Rule 903 or 904 of Regulation S or Rule 144 (if available).

(h) Any beneficial interest in one of the Global Notes that is transferred to a Person who takes delivery in the form of an interest in another Global Note shall, upon transfer, cease to be an interest in such Global Note and become an interest in such other Global Note and, accordingly, shall thereafter be subject to all transfer restrictions and other procedures applicable to beneficial interests in such other Global Note for as long as it remains such an interest.

(i) The Holder of any Global Note may grant proxies and otherwise authorize any Person, including Agent Members and Persons that may hold interests through Agent Members, to take any action which a Holder is entitled to take under this Indenture or the Notes.

#### SECTION 2.17. Special Transfer Provisions.

(a) Transfers to Non-QIB Institutional Accredited Investors and Non-U.S. Persons.  
The following provisions shall apply with respect to the registration of any proposed transfer of a Note

constituting a Restricted Note to any Institutional Accredited Investor which is not a QIB or to any Non-U.S. Person:

(i) the Registrar shall register the transfer of any Note constituting a Restricted Note, whether or not such Note bears the Private Placement Legend, if (x) the requested transfer is after the date such Note shall be freely transferable under Rule 144 as certified in an Officer's Certificate or (y) (1) in the case of a transfer to an Institutional Accredited Investor which is not a QIB (excluding Non-U.S. Persons), the proposed transferee has delivered to the Registrar a certificate substantially in the form of Exhibit E hereto and an Opinion of Counsel reasonably satisfactory to the Issuer and the Trustee or (2) in the case of a transfer to a Non-U.S. Person (including a QIB), the proposed transferor has delivered to the Registrar a certificate substantially in the form of Exhibit F hereto; *provided* that in the case of any transfer of a Note bearing the Private Placement Legend for a Note not bearing the Private Placement Legend, the Registrar has received an Officer's Certificate authorizing such transfer; and

(ii) if the proposed transferor is an Agent Member holding a beneficial interest in a Global Note, upon receipt by the Registrar of (x) the certificate, if any, required by paragraph (i) above and (y) instructions given in accordance with the Depository's and the Registrar's procedures,

whereupon (a) the Registrar shall reflect on its books and records the date and (if the transfer does not involve a transfer of outstanding Physical Notes) a decrease in the principal amount of a Global Note in an amount equal to the principal amount of the beneficial interest in a Global Note to be transferred, and (b) the Registrar shall reflect on its books and records the date and an increase in the principal amount of a Global Note in an amount equal to the principal amount of the beneficial interest in the Global Note transferred or the Issuer shall execute and the Trustee shall authenticate and make available for delivery one or more Physical Notes of like tenor and amount.

(b) Transfers to QIBs. The following provisions shall apply with respect to the registration or any proposed registration of transfer of a Note constituting a Restricted Note to a QIB (excluding transfers to Non-U.S. Persons):

(i) the Registrar shall register the transfer if such transfer is being made by a proposed transferor who has checked the box provided for on such Holder's Note stating, or has otherwise advised the Issuer and the Registrar in writing, that the sale has been made in compliance with the provisions of Rule 144A to a transferee who has signed the certification provided for on such Holder's Note stating, or has otherwise advised the Issuer and the Registrar in writing, that it is purchasing the Note for its own account or an account with respect to which it exercises sole investment discretion and that it and any such account is a QIB within the meaning of Rule 144A, and is aware that the sale to it is being made in reliance on Rule 144A and acknowledges that it has received such information regarding the Issuer as it has requested pursuant to Rule 144A or has determined not to request such information and that it is aware that the transferor is relying upon its foregoing representations in order to claim the exemption from registration provided by Rule 144A; and

(ii) if the proposed transferee is an Agent Member, and the Notes to be transferred consist of Physical Notes which after transfer are to be evidenced by an interest in the Global Note, upon receipt by the Registrar of instructions given in accordance with the Applicable Procedures, the Registrar shall reflect on its books and records the date and an increase in the principal amount of the Global Note in an amount equal to the principal amount of the Physical Notes to be transferred, and the Trustee shall cancel the Physical Notes so transferred.

(c) Private Placement Legend. Upon the registration of transfer, exchange or replacement of Notes not bearing the Private Placement Legend, the Registrar shall deliver Notes that do not bear the Private Placement Legend. Upon the registration of transfer, exchange or replacement of Notes bearing the Private Placement Legend, the Registrar shall deliver only Notes that bear the Private Placement Legend unless (i) it has received the Officer's Certificate required by paragraph (a)(i)(y) of this Section 2.17, (ii) there is delivered to the Registrar an Opinion of Counsel reasonably satisfactory to the Issuer and the Trustee to the effect that neither such legend nor the related restrictions on transfer are required in order to maintain compliance with the provisions of the Securities Act or (iii) such Note has been sold pursuant to an effective registration statement under the Securities Act and the Registrar has received an Officer's Certificate from the Issuer to such effect or such Note has been exchanged in the Exchange Offer under the applicable Registration Rights Agreement.

(d) General. By its acceptance of any Note bearing the Private Placement Legend, each Holder of such Note acknowledges the restrictions on transfer of such Note set forth in this Indenture and in the Private Placement Legend and agrees that it will transfer such Note only as provided in this Indenture.

The Registrar shall retain for a period of two years or as may otherwise be required by applicable law copies of all letters, notices and other written communications received pursuant to Section 2.16 or this Section 2.17. The Issuer shall have the right to inspect and make copies of all such letters, notices or other written communications at any reasonable time upon the giving of reasonable notice to the Registrar.

#### SECTION 2.18. Computation of Interest.

Interest on the Notes shall be computed on the basis of a 360-day year of twelve 30-day months.

### ARTICLE THREE

#### REDEMPTION AND PREPAYMENT

##### SECTION 3.01. Election To Redeem; Notices to Trustee.

If the Issuer elects to redeem Notes pursuant to Section 3.07, at least 30 days prior to the Redemption Date (unless a shorter notice shall be agreed to in writing by the Trustee) but not more than 60 days before the Redemption Date, except that any such notice to the Trustee may be given to the Trustee more than 60 days prior to a Redemption Date if the notice is issued in connection with a Legal Defeasance or a satisfaction or discharge of this Indenture pursuant to Section 9.01, the Issuer shall notify the Trustee in writing of the Redemption Date, the principal amount of Notes to be redeemed and the redemption price, and deliver to the Trustee an Officer's Certificate stating that such redemption will comply with the conditions contained in Section 3.07. Notice given to the Trustee pursuant to this Section 3.01 may not be revoked after the time that notice is given to Holders pursuant to Section 3.03. If the redemption price is not known at the time such notice is to be given, the actual redemption price, calculated as described in the terms of the Notes, will be set forth in an Officer's Certificate of the Issuer delivered to the Trustee no later than two Business Days prior to the Redemption Date.

##### SECTION 3.02. Selection by Trustee of Notes to Be Redeemed.

In the event that less than all of the Notes are to be redeemed pursuant to a redemption made pursuant to Section 3.07, selection of the Notes for redemption shall be made in accordance with



Applicable Procedures if the Notes are Global Notes, otherwise by the Trustee in compliance with the requirements of the principal national securities exchange, if any, on which the Notes are listed or, if the Notes are not then listed on a national securities exchange, on a *pro rata* basis, by lot or by such method as the Trustee shall deem fair and appropriate; *provided, however*, that no Notes of a principal amount of \$2,000 or less shall be redeemed in part. The Trustee shall promptly notify the Issuer of the Notes selected for redemption and, in the case of any Notes selected for partial redemption, the principal amount thereof to be redeemed. The Trustee may select for redemption portions of the principal of the Notes that have denominations larger than \$2,000 in whole multiples of \$1,000 in excess thereof. For all purposes of this Indenture unless the context otherwise requires, provisions of this Indenture that apply to Notes called for redemption also apply to portions of Notes called for redemption. The Issuer may acquire Notes by means other than redemption, whether pursuant to an Issuer tender offer, open market purchase or otherwise; *provided* such acquisition does not otherwise violate the other terms of this Indenture.

SECTION 3.03. Notice of Redemption.

At least 30 days, and no more than 60 days, before a Redemption Date, the Issuer shall mail by first-class mail or electronically deliver, or cause to be mailed by first-class mail or electronically delivered, a notice of redemption to each Holder of Notes to be redeemed at his or her last address as the same appears on the registry books maintained by the Registrar pursuant to Section 2.04, except that redemption notices may be mailed or electronically delivered more than 60 days prior to a Redemption Date if the notice is issued in connection with a defeasance of the Notes or a satisfaction or discharge of this Indenture.

The notice shall identify the Notes to be redeemed (including the CUSIP numbers, ISIN and Common Code numbers, if any thereof) and shall state:

- (1) the Redemption Date;
- (2) the redemption price and the amount of premium, if any, or manner of computation if not then known, and accrued interest to be paid;
- (3) if any Note is being redeemed in part, the portion of the principal amount of such Note to be redeemed and that, after the Redemption Date and upon surrender of such Note, a new Note or Notes in principal amount equal to the unredeemed portion will be issued;
- (4) the name and address of the Paying Agent;
- (5) that Notes called for redemption must be surrendered to the Paying Agent to collect the redemption price;
- (6) that unless the Issuer defaults in making the redemption payment, interest on Notes called for redemption ceases to accrue on and after the Redemption Date;
- (7) the provision of Section 3.07, as the case may be, pursuant to which the Notes called for redemption are being redeemed; and
- (8) the aggregate principal amount of Notes that are being redeemed.

At the Issuer's request, the Trustee shall forward the notice of redemption in the Issuer's name and at the Issuer's expense; *provided* that the Trustee has received notice of such request at least 45



days prior to such Redemption Date unless a shorter time is agreed to by the Trustee. In such event, the Issuer shall provide the Trustee with the information required by this Section 3.03.

SECTION 3.04. Effect of Notice of Redemption.

Once the notice of redemption described in Section 3.03 is mailed or electronically delivered, Notes called for redemption become due and payable on the Redemption Date and at the redemption price, including any premium, plus interest accrued to the Redemption Date. Upon surrender to the Paying Agent, such Notes shall be paid at the redemption price, including any premium, plus interest accrued to the Redemption Date; *provided* that if the Redemption Date is after a regular record date and on or prior to the Interest Payment Date, the accrued interest shall be payable to the Holder of the redeemed Notes registered on the relevant record date, and *provided, further*, that if a Redemption Date is a Legal Holiday, payment shall be made on the next succeeding Business Day with the same force and effect as if made on such Redemption Date and no interest shall accrue for the period from such Redemption Date to such succeeding Business Day. Failure to give notice or any defect in the notice to any Holder shall not affect the validity of the notice to any other Holder.

SECTION 3.05. Deposit of Redemption Price.

On or prior to 10:00 a.m., New York City time, on each Redemption Date, the Issuer shall deposit with the Paying Agent in immediately available funds money sufficient to pay the redemption price of, including premium, if any, and accrued interest on all Notes to be redeemed on that date other than Notes or portions thereof called for redemption on that date which have been delivered by the Issuer to the Trustee for cancellation.

On and after any Redemption Date, if money sufficient to pay the redemption price of, including premium, if any, and accrued interest on Notes called for redemption shall have been made available in accordance with the preceding paragraph, the Notes called for redemption will cease to accrue interest and the only right of the Holders of such Notes will be to receive payment of the redemption price of and, subject to the first proviso in Section 3.04, accrued and unpaid interest on such Notes to the Redemption Date. If any Note surrendered for redemption shall not be so paid, interest will be paid, from the Redemption Date until such redemption payment is made, on the unpaid principal of the Note and (to the extent permitted by applicable law) any interest not paid on such unpaid principal, in each case, at the rate and in the manner provided in the Notes.

SECTION 3.06. Notes Redeemed in Part.

Upon surrender of a Note that is redeemed in part, the Issuer shall execute and the Trustee shall authenticate for the Holder thereof a new Note equal in principal amount to the unredeemed portion of the Note surrendered.

SECTION 3.07. Optional Redemption.

At any time and from time to time the Issuer may redeem the Notes in whole or in part, at its option, at a redemption price equal to the greater of (1) 100% of the principal amount of the Notes to be redeemed and (2) the sum of the present values of the remaining scheduled payments of principal and interest thereon discounted to the Redemption Date at the Treasury Rate, plus 50 basis points, plus accrued interest thereon to the Redemption Date.

Unless the Issuer defaults in payment of the redemption price, on and after the Redemption Date, interest will cease to accrue on the Notes or portions thereof called for redemption.

SECTION 3.08. Mandatory Redemption.

The Issuer shall not be required to make mandatory redemption or sinking fund payments with respect to the Notes.

ARTICLE FOUR

COVENANTS

SECTION 4.01. Payment of Notes.

The Issuer shall pay the principal of, premium, if any, and interest on the Notes on the dates and in the manner provided in the Notes and this Indenture. An installment of principal or interest shall be considered paid on the date it is due if the Trustee or Paying Agent holds as of 10:00 a.m., New York City time, on that date money designated for and sufficient to pay such installment.

The Issuer shall pay interest on overdue principal (including post-petition interest in a proceeding under any Bankruptcy Law), and overdue interest, to the extent lawful, at the rate specified in the Notes.

SECTION 4.02. Reports to Holders.

(a) Whether or not required by the rules and regulations of the Commission, so long as any Notes are outstanding, the Issuer shall file with the Commission (unless the Commission will not accept such filings) and furnish to the Trustee and Holders all quarterly and annual financial information (including a Management's Discussion and Analysis of Financial Condition and Results of Operations) that would be required to be contained in a filing with the Commission on Forms 10-Q and 10-K if the Notes were registered under the Exchange Act and on or prior to the dates on which such filings with the Commission would be required to be made. Notwithstanding the foregoing, prior to the commencement of the exchange offer contemplated by the Initial Purchasers Registration Rights Agreement or the effectiveness of the shelf registration statement contemplated by such Registration Rights Agreement, such reports shall not be required to include any financial information required by Rule 3-10 of Regulation S-X.

(b) The Issuer shall deliver to the Trustee a Collateral Coverage Certificate together with each delivery of quarterly or annual financial information required by Section 4.02(a).

(c) The Issuer shall, for so long as any Notes remain outstanding during any period when it is not subject to Section 13 or 15(d) of the Exchange Act, or otherwise furnishing such information pursuant to Rule 12g3-2(b) of the Exchange Act, furnish to Holders and to prospective investors, upon their request, the information required to be delivered pursuant to clause (d)(4) of Rule 144A.

(d) Notwithstanding the foregoing, if the Issuer is exempt from the requirements of Section 13 or 15(d) of the Exchange Act under Rule 12h-5 of the Exchange Act, the Issuer shall not be required to file such reports and documents with the Commission under Section 13 or 15(d) of the Exchange Act (or any successor provisions thereto) or provide such annual reports and such information, documents and other reports to the Trustee and Holders so long as (i) a direct parent entity that guarantees the Notes files such annual reports and such information, documents and other reports with the Commission, (ii) such parent entity, the Issuer and each Guarantor are in compliance with the requirements set forth in Rule 3-10 of Regulation S-X under the Exchange Act and (iii) the Issuer provides the Trustee and

Holders with such annual reports and such information, documents and other reports filed by such parent entity.

(e) Notwithstanding the foregoing, the Issuer shall be deemed to have furnished the reports referred to in Section 4.02(a) to the Trustee and to Holders if the Issuer has filed such reports with the Commission via the EDGAR filing system and such reports are publicly available.

(f) Delivery of reports, information and documents to the Trustee hereunder is for informational purposes only and the Trustee's receipt of any such reports, information and documents shall not constitute constructive notice of any information contained therein or determinable from information contained therein, including the Issuer's compliance with any of its covenants hereunder (as to which the Trustee is entitled to rely exclusively on Officer's Certificates or statements delivered to the Trustee pursuant to Section 4.03).

(g) To the extent applicable, the Issuer shall comply with TIA § 314(a).

SECTION 4.03. Compliance Certificate.

The Issuer shall deliver to the Trustee, within 120 days after the end of each fiscal year, a written statement that need not comply with Section 12.05 signed by its principal executive officer, principal accounting officer or principal financial officer, stating that:

(a) a review of the activities of the Issuer during such year with regard to its compliance with this Indenture has been made under such officer's supervision; and

(b) to the best of such officer's knowledge, based on such review, the Issuer has fulfilled all its obligations under this Indenture throughout such year, or, if there has been a default in the fulfillment of any such obligation, specifying each such default known to such officer and the nature and status thereof, all without regard to grace periods or notice requirements.

SECTION 4.04. Limitations on Liens.

The Issuer shall not, and shall not cause or permit any Restricted Subsidiary to, directly or indirectly, create, incur, assume or permit or suffer to exist any Liens (other than Permitted Liens) of any kind against or upon (i) prior to the occurrence of a Fall-Away Event, the Collateral or any proceeds thereof and (ii) from and after the occurrence of a Fall-Away Event, any property or assets of the Issuer or any of its Restricted Subsidiaries or any proceeds thereof, in each case, to secure indebtedness for borrowed money and whether such assets are owned on the Issue Date or acquired after the Issue Date.

SECTION 4.05. Limitation on Sale and Leaseback Transactions.

(a) The Issuer shall not, and shall not permit any Restricted Subsidiary to, enter into any arrangement with any Person providing for the sale by the Issuer or any Restricted Subsidiary of any property more than 180 days following the Issuer's or such Restricted Subsidiary's acquisition of such property, with the intention of taking back a lease of such property (a "Sale and Leaseback Transaction") unless the terms of such sale or transfer have been determined by the Issuer's Board of Directors to be fair and arm's-length and either:

(i) within 12 months after the receipt of the proceeds of the sale or transfer, the Issuer or any of its Subsidiaries applies an amount equal to the net proceeds of the sale or transfer

to the prepayment or retirement of indebtedness (other than any indebtedness that is subordinated to the Notes); or

(ii) the Issuer or such Restricted Subsidiary would be entitled, at the effective date of the sale or transfer, to incur indebtedness secured by a Lien on such property (and such Attributable Debt shall be deemed to be secured by a Lien on such property) in an amount at least equal to the Attributable Debt in respect of the Sale and Leaseback Transaction pursuant to Section 4.04.

(b) Clause (a) of this Section 4.05 will not apply to any Sale and Leaseback Transaction (i) for a term of not more than three years including renewals; or (ii) between the Issuer and a Subsidiary or between Subsidiaries, *provided* that the lessor is the Issuer or a wholly owned Subsidiary of the Issuer.

#### SECTION 4.06. Additional Guarantees.

If, any of the Domestic Subsidiaries of the Issuer becomes a Specified Subsidiary, then the Issuer shall cause such Specified Subsidiary (unless such Specified Subsidiary is already a Guarantor) to:

(a) execute and deliver to the Trustee a supplemental indenture pursuant to which such Specified Subsidiary shall unconditionally guarantee all of the Issuer's obligations under the Notes and this Indenture and, unless a Fall-Away Event has occurred, enter into joinders to the Security Documents to grant the Collateral Agent a Lien on the assets of such Subsidiary constituting Collateral; and

(b) deliver to the Trustee one or more Opinions of Counsel that, subject to customary qualifications, such supplemental indenture and guarantee (i) have been duly authorized, executed and delivered by such Subsidiary and (ii) constitute valid and legally binding obligations of such Subsidiary, enforceable in accordance with their terms.

#### SECTION 4.07. Change of Control Offer.

(a) If a Change of Control Triggering Event occurs with respect to the Notes, unless the Issuer has exercised its right to redeem the Notes pursuant to Section 3.07, the Issuer shall commence a Change of Control Offer no later than 30 days following any Change of Control Triggering Event (or at the Issuer's option, prior to any Change of Control, but after the public announcement of the Change of Control). In the Change of Control Offer, the Issuer shall offer payment in cash equal to 101% of the aggregate principal amount of Notes repurchased plus accrued and unpaid interest, if any, on the Notes repurchased, to the date of purchase (the "Change of Control Payment").

(b) On the Change of Control Payment Date, the Issuer shall, to the extent lawful: (i) accept for payment all Notes or portions of Notes properly tendered pursuant to the Change of Control Offer; (ii) deposit with the Paying Agent an amount equal to the Change of Control Payment in respect of all Notes or portions of Notes properly tendered; and (iii) deliver or cause to be delivered to the Trustee the Notes properly accepted together with an Officer's Certificate stating the aggregate principal amount of Notes or portions of Notes being purchased.

(c) The Issuer shall not be required to make a Change of Control Offer upon the occurrence of a Change of Control Triggering Event if a third party makes such an offer in the manner, at the times and otherwise in compliance with the requirements for an offer made by the Issuer and the third party repurchases all Notes properly tendered and not withdrawn under its offer.



(d) The Issuer shall comply with the requirements of Rule 14e-1 under the Exchange Act and any other securities laws and regulations thereunder to the extent those laws and regulations are applicable in connection with the repurchase of the Notes as a result of a Change of Control Triggering Event. To the extent that the provisions of any securities laws or regulations conflict with this Section 4.07, the Issuer shall comply with the applicable securities laws and regulations and will not be deemed to have breached the Issuer's obligations under this Section 4.07 by virtue of such conflicts.

SECTION 4.08. Collateral Coverage Offer.

(a) If prior to the occurrence of a Fall-Away Event, a Collateral Coverage Event occurs, unless the Issuer has exercised its option to redeem such Notes, the Issuer shall make a Collateral Coverage Offer no later than 30 days following any Collateral Coverage Event. In a Collateral Coverage Offer, the Issuer shall offer payment in cash equal to 101% of the aggregate principal amount of Notes repurchased, plus accrued and unpaid interest, if any, on the Notes repurchased to the date of repurchase (a "Collateral Coverage Event Payment").

(b) On the Collateral Coverage Payment Date, the Issuer shall, to the extent lawful:

(i) accept for payment all Notes or portions of Notes properly tendered pursuant to the Collateral Coverage Offer; *provided* that in the event the aggregate principal amount of Notes validly tendered for purchase in the Collateral Coverage Offer exceeds the Collateral Coverage Required Amount for such Collateral Coverage Offer, the Issuer will, subject to the applicable procedures of the Depository, accept for payment only the Collateral Coverage Required Amount of Notes on a *pro rata* basis from Holders who have validly tendered their Notes in such Collateral Coverage Offer (subject to rounding such that all remaining Notes are in a minimum principal amount of \$2,000 and in whole multiples of \$1,000 in excess thereof);

(ii) deposit with the Paying Agent an amount equal to the Collateral Coverage Event Payment in respect of all Notes or portions of Notes required to be accepted for payment as provided hereunder; and

(iii) deliver or cause to be delivered to the Trustee the Notes accepted for purchase together with an Officer's Certificate stating the aggregate principal amount of Notes or portions of Notes being purchased.

(c) The Issuer shall comply with the requirements of Rule 14e-1 under the Exchange Act, and any other securities laws and regulations thereunder to the extent those laws and regulations are applicable in connection with the repurchase of the Notes as a result of a Collateral Coverage Event. To the extent that the provisions of any such securities laws or regulations conflict with this Section 4.08, the Issuer shall comply with those securities laws and regulations and will not be deemed to have breached the Issuer's obligations under this Section 4.08 by virtue of any such conflict.

SECTION 4.09. Calculations.

Issuer will be responsible for making calculations called for under the Notes, including but not limited to determination of redemption price, premium, if any, Additional Interest, and other amounts payable on the Notes, if any. The Issuer will make the calculations in good faith and, absent manifest error, its calculations will be final and binding on the Holders of the notes. The Issuer will provide a schedule of its calculations to the Trustee when applicable, and the Trustee is entitled to rely conclusively on the accuracy of the Issuer's calculations without independent verification.



## ARTICLE FIVE

### SUCCESSOR CORPORATION

#### SECTION 5.01. Limitations on Mergers and Sales of Assets.

The Issuer shall not consolidate with or merge into another Person, or sell other than for cash or lease all or substantially all of the Issuer's assets to another Person, unless:

(a) either the Issuer is the continuing Person or the successor Person (if other than the Issuer) expressly assumes by supplemental indenture the obligations of the Issuer under this Indenture and the Notes;

(b) immediately after the merger, consolidation, sale or lease, no Default shall have occurred and be continuing; and

(c) the Issuer shall deliver, or cause to be delivered, to the Trustee, in form reasonably satisfactory to the Trustee, an Officer's Certificate and an Opinion of Counsel, each stating that such transaction or series of transactions and the supplemental indenture, if any, in respect thereto comply with this covenant and that all conditions precedent herein provided for relating to such transaction or series of transactions have been satisfied and stating whether, in the case of a sale or lease, the Issuer shall be released from its obligations and covenants under this Indenture in accordance with Section 5.02.

#### SECTION 5.02. Successor Person Substituted.

Upon any consolidation or merger, or any transfer of all or substantially all of the properties or assets of the Issuer in accordance with Section 5.01, the successor Person formed by such consolidation or into which the Issuer is merged or to which such transfer is made shall succeed to, and be substituted for, and may exercise every right and power of, the Issuer under this Indenture and the Notes with the same effect as if such successor entity had been named as the Issuer herein and therein, and thereafter the predecessor Person shall be relieved of all obligations and covenants under this Indenture and the Notes, but, in the case of a lease of all or substantially all its assets, the predecessor will not be released from the obligation to pay the principal of and interest on the Notes.

## ARTICLE SIX

### DEFAULTS AND REMEDIES

#### SECTION 6.01. Events of Default.

Each of the following in an "Event of Default":

(1) the failure of the Issuer to pay any installment of interest on any Note, when and as the same shall become due and payable, which failure shall have continued unremedied for a period of 30 days;

(2) the failure of the Issuer to pay the principal or premium, if any, on any Note, when and as the same shall become due and payable, whether at maturity as therein expressed, by call for redemption, by declaration as authorized by this Indenture or otherwise;

(3) the failure of the Issuer to observe and perform any other of the covenants or agreements on the part of the Issuer contained in this Indenture (including any indenture supplemental hereto), which failure shall not have been remedied to the satisfaction of the Trustee, or without provision deemed by the Trustee to be adequate for the remedying thereof having been made, for a period of 60 days after the written notice specified below shall have been given;

(4) the entry by a court having jurisdiction in the premises of a decree or order for relief in respect of the Issuer in an involuntary case under the Federal bankruptcy laws, as now or hereafter constituted, or any other applicable Federal or State bankruptcy, insolvency or other similar law now or hereafter in effect, or appointing a receiver, liquidator, assignee, custodian, trustee or sequestrator (or similar official) of the Issuer or for substantially all of its property, or ordering the winding-up or liquidation of the Issuer's affairs, and such decree or order shall remain unstayed and in effect for a period of 90 consecutive days;

(5) the commencement by the Issuer of a voluntary case under the Federal bankruptcy laws, as now or hereafter constituted, or any other applicable Federal or State bankruptcy, insolvency or other similar law now or hereafter in effect, or the consent by the Issuer to the entry of an order for relief in an involuntary case under any such law, or the consent by the Issuer to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian or sequestrator (or similar official) of the Issuer or for substantially all of its property, or the making by it of an assignment for the benefit of creditors; or

(6) any Lien purported to be created by any Security Document on Collateral with a book value in excess of \$100.0 million shall cease to be a valid and enforceable Lien except in accordance with the Security Documents, which failure shall not have been remedied to the satisfaction of the Trustee, or without provision deemed by the Trustee to be adequate for the remedying thereof having been made, for a period of 30 days after the written notice specified below shall have been given.

A Default with respect to Notes under clauses (3) and (6) of this Section 6.01 shall not be an Event of Default until the Trustee (by notice to the Issuer) or the Holders of at least 25% in aggregate principal amount of the outstanding Notes (by notice to the Issuer and the Trustee) gives written notice of the Default to the Issuer and the Issuer does not cure such Default within the time specified in clauses (3) or (6) above, as applicable, after receipt of such notice. Such notice must specify the Default, demand that it be remedied and state that such notice is a "Notice of Default."

#### SECTION 6.02. Acceleration.

If an Event of Default (other than an Event of Default specified in clause (4) or (5) of Section 6.01), shall have occurred and be continuing, the Trustee or the Holders of at least 25% in aggregate principal amount of the Notes then outstanding may declare all unpaid principal of, and premium, if any, and accrued and unpaid interest on all of the outstanding Notes to be due and payable by notice in writing to the Issuer and the Trustee specifying the respective Event of Default and that it is a "notice of acceleration", and the same shall become immediately due and payable.

If an Event of Default specified in clause (4) or (5) of Section 6.01 occurs, then all unpaid principal of, and premium, if any, and accrued and unpaid interest on all of the outstanding Notes shall *ipso facto* become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holder.

SECTION 6.03. Other Remedies.

If an Event of Default occurs and is continuing, the Trustee may pursue any available remedy by proceeding at law or in equity to collect the payment of principal of, or premium, if any, and interest on the Notes or to enforce the performance of any provision of the Notes or this Indenture and may take any necessary action requested of it as Trustee to settle, compromise, adjust or otherwise conclude any proceedings to which it is a party.

The Trustee may maintain a proceeding even if it does not possess any of the Notes or does not produce any of them in the proceeding. A delay or omission by the Trustee or any Holder in exercising any right or remedy accruing upon an Event of Default shall not impair the right or remedy or constitute a waiver of or acquiescence in the Event of Default. No remedy is exclusive of any other remedy. All available remedies are cumulative to the extent permitted by law.

SECTION 6.04. Waiver or Rescission of Past Defaults and Events of Default.

(1) At any time after a declaration of acceleration with respect to the Notes as described in Section 6.02, the Holders of a majority in aggregate principal amount of the Notes at the time outstanding may rescind and cancel such declaration and its consequences:

- (a) if the rescission would not conflict with any judgment or decree;
- (b) if all existing Events of Default have been cured or waived except nonpayment of principal or interest that has become due solely because of the acceleration;
- (c) to the extent the payment of such interest is lawful, interest on overdue installments of interest and overdue principal, which has become due otherwise than by such declaration of acceleration, has been paid;
- (d) if the Issuer has paid the Trustee its reasonable compensation and reimbursed the Trustee for its expenses, disbursements and advances; and
- (e) in the event of the cure or waiver of an Event of Default of the type described in clauses (4) or (5) of Section 6.01, the Trustee shall have received an Officer's Certificate and an Opinion of Counsel that such Event of Default has been cured or waived.

No such rescission shall affect any subsequent Default or impair any right consequent thereto.

(2) The Holders of a majority in aggregate principal amount of the Notes issued and then outstanding under this Indenture may waive any existing Default or Event of Default under this Indenture, and its consequences, except (a) a Default described in clause (1) or (2) of Section 6.01 and (b) in respect of a covenant or provision in this Indenture that cannot be modified or amended without the consent of each Holder of an outstanding Note affected thereby.

SECTION 6.05. Control by Majority.

Subject to the other provisions of this Indenture and applicable law, the Holders of a majority in aggregate principal amount of the Notes then outstanding may direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on the Trustee by this Indenture. Subject to Section 7.02, the Trustee, however, may refuse to follow any direction that conflicts with law or this Indenture or that the Trustee determines may be unduly

prejudicial to the rights of another Holder not taking part in such direction (it being understood the Trustee shall have no obligation to determine whether any such actions or forebearances are unduly prejudicial to such other Holders), and the Trustee shall have the right to decline to follow any such direction if the Trustee, being advised by counsel, determines that the action so directed may not lawfully be taken or if the Trustee in good faith shall, by a Responsible Officer, determine that the proceedings so directed may result in costs and expenses of the Trustee for which it has no source of payment or recovery or involve it in personal liability to which it does not have adequate indemnity; *provided* that the Trustee may take any other action deemed proper by the Trustee which is not inconsistent with such direction.

SECTION 6.06. Limitation on Suits.

No Holder of any Note shall have any right to institute an action, suit or proceeding at law or in equity with respect to this Indenture, or for the execution of any trust hereunder or for the appointment of a receiver or for any other remedy hereunder, in each case with respect to an Event of Default with respect to such Notes, unless (1) such Holder previously shall have given to the Trustee written notice of the occurrence of one or more Events of Default with respect to such Notes; (2) the Holders of at least 25% in aggregate principal amount of the outstanding Notes of such series shall have requested the Trustee in writing to take action in respect of the matter complained of; and (3) such Holder or Holders have offered to the Trustee security and indemnity satisfactory to it against the costs, expenses and liabilities to be incurred therein or thereby and the Trustee, for 60 days after receipt of such notification, request and offer of security and indemnity, shall have neglected or refused to institute any such action, suit or proceeding, and such notification, request and offer of security and indemnity are hereby declared in every such case to be conditions precedent to any such action, suit or proceeding by any Holder of any Note, it being understood and intended that no one or more of such Holders shall have any right in any manner whatsoever by his or their action to enforce any right hereunder, except in the manner herein provided, and that every action, suit or proceeding at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all Holders of the outstanding Notes of such series; *provided, however*, that nothing contained in this Indenture or in the Notes shall affect or impair the obligation of the Issuer, which is absolute and unconditional, to pay the principal of (and premium, if any) and (subject to Section 2.13) interest on the Notes of such series to the respective Holders of such Notes at the stated maturity expressed in such Notes, or affect or impair the right, which is also absolute and unconditional, of such Holders to institute suit to enforce any such payment.

SECTION 6.07. No Personal Liability of Directors, Officers, Employees and Stockholders.

No direct or indirect parent, and no past, present or future director, officer, employee, incorporator, member, partner or stockholder of the Issuer, any Subsidiary or any direct or indirect parent (other than the Guarantors pursuant to the Guarantees), as such, will have any liability for any obligations of the Issuer or the Guarantors under the Notes, this Indenture or any Guarantee, or for any claim based on, in respect of, or by reason of, such obligations or their creation. Each Holder by accepting a Note waives and releases all such liability. This waiver and release are part of the consideration for issuance of the Notes and the Guarantees. This waiver may not be effective to waive liabilities under the securities laws.

SECTION 6.08. Rights of Holders To Receive Payment.

Notwithstanding any other provision of this Indenture, the right of any Holder of a Note to receive payment of principal of, or premium, if any, and interest of the Note (including Additional Interest, if any) on or after the respective due dates expressed in the Note, or to bring suit for the enforcement of any such payment on or after such respective dates shall not be impaired or affected without the consent of the Holder.



SECTION 6.09. Collection Suit by Trustee.

If an Event of Default in payment of principal, premium or interest specified in clause (1) or (2) of Section 6.01 occurs and is continuing, the Trustee may recover judgment in its own name and as trustee of an express trust against the Issuer or any Guarantor (or any other obligor on the Notes) for the whole amount of unpaid principal and accrued interest remaining unpaid, together with interest on overdue principal and, to the extent that payment of such interest is lawful, interest on overdue installments of interest, in each case at the rate set forth in the Notes.

SECTION 6.10. Trustee May File Proofs of Claim.

The Trustee may file such proofs of claim and other papers or documents as may be necessary or advisable in order to have the claims of the Trustee and the Holders allowed in any judicial proceedings relative to the Issuer or any Guarantor (or any other obligor upon the Notes), its creditors or its property and shall be entitled and empowered to collect and receive any monies or other property payable or deliverable on any such claims and to distribute the same after deduction of its charges and expenses to the extent that any such charges and expenses are not paid out of the estate in any such proceedings and any Custodian in any such judicial proceeding is hereby authorized by each Holder to make such payments to the Trustee, and in the event that the Trustee shall consent to the making of such payments directly to the Holders, to pay to the Trustee any amount due to it for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, and any other amounts due the Trustee under Section 7.01(a). To the extent that the payment of any such compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, and any other amounts due the Trustee under Section 7.01(a) hereof out of the estate in any such proceeding, shall be denied for any reason, payment of the same shall be secured by a lien on, and shall be paid out of, any and all distributions, dividends, money, securities and other properties that may be distributable in respect of the Issuer's or Guarantors' obligations under this Indenture or that the Holders may be entitled to receive in such proceeding whether in liquidation or under any plan of reorganization or arrangement or otherwise.

Nothing herein contained shall be deemed to authorize the Trustee to authorize or consent to or accept or adopt on behalf of any Holder any plan or reorganization, arrangement, adjustment or composition affecting the Notes or the rights of any Holder thereof, or to authorize the Trustee to vote in respect of the claim of any Holder in any such proceedings. The Trustee may, unless prohibited by applicable law, vote for the election of a trustee in bankruptcy or similar person and shall be entitled to participate as a member of any official committee of creditors in the matter as it deems necessary or advisable.

SECTION 6.11. Priorities.

Subject to the terms of the Intercreditor Agreement and the Security Documents, if the Trustee collects any money or property pursuant to this Article Six or from the Collateral Agent pursuant to any Security Document, it shall pay out the money or property in the following order:

First: to the Collateral Agent for amounts due in accordance with the terms of the Security Documents;

Second: to the Trustee for amounts due under Section 7.01(a);

Third: to Holders for interest accrued on the Notes, ratably, without preference or priority of any kind, according to the amounts due and payable on the Notes for interest;



Fourth: to Holders for principal amounts due and unpaid on the Notes, ratably, without preference or priority of any kind, according to the amounts due and payable on the Notes for principal; and

Fifth: to the Issuer or, if applicable, the Guarantors, as their respective interests may appear.

The Trustee, upon prior notice to the Issuer, may fix a record date and payment date for any payment to Holders pursuant to this Section 6.11.

SECTION 6.12. Undertaking for Costs.

In any suit for the enforcement of any right or remedy under this Indenture or in any suit against the Trustee for any action taken or omitted by it as Trustee, a court in its discretion may require the filing by any party litigant in the suit of an undertaking to pay the costs of the suit, and the court in its discretion may assess reasonable costs, including reasonable attorneys' fees and expenses, against any party litigant in the suit, having due regard to the merits and good faith of the claims or defenses made by the party litigant. This Section 6.12 does not apply to a suit by the Trustee, a suit by a Holder pursuant to Section 6.08 or a suit by Holders of more than 10% in principal amount of the Notes then outstanding.

SECTION 6.13. Restoration of Rights and Remedies.

If the Trustee or any Holder has instituted any proceeding to enforce any right or remedy under this Indenture and such proceeding has been discontinued or abandoned for any reason, or has been determined adversely to the Trustee or to such Holder, then and in every case, subject to any determination in such proceeding, the Issuer, the Guarantors, the Trustee and the Holders shall be restored severally and respectively to their former positions hereunder and thereafter all rights and remedies of the Trustee and the Holders shall continue as though no such proceeding had been instituted.

SECTION 6.14. Appointment and Authorization of Wells Fargo Bank, National Association as Collateral Agent.

(a) Wells Fargo Bank, National Association is hereby designated and appointed as the Collateral Agent of the Holders under the Security Documents, and is authorized as the Collateral Agent for such Holders to execute and enter into each of the Security Documents and all other instruments relating to the Security Documents and (i) to take action and exercise such powers as are expressly required or permitted hereunder and under the Security Documents and all instruments relating hereto and thereto and (ii) to exercise such powers and perform such duties as are in each case, expressly delegated to the Collateral Agent by the terms hereof and thereof together with such other powers as are reasonably incidental hereto and thereto.

(b) Notwithstanding any provision to the contrary elsewhere in this Indenture or the Security Documents, the Collateral Agent shall not have any duties or responsibilities except those expressly set forth herein or therein or any fiduciary relationship with any Holder, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Indenture or any Security Document or otherwise exist against the Collateral Agent.

(c) The Collateral Agent may consult with counsel of its selection and the advice or opinion of such counsel as to matters of law shall be full and complete authorization and protection from liability in respect of any action taken, omitted or suffered by it hereunder or under the Security Documents in good faith and in accordance with the advice or opinion of such counsel.

## ARTICLE SEVEN

### TRUSTEE

#### SECTION 7.01. Acceptance of Trusts Upon Specified Conditions.

The Trustee accepts the trusts created by this Indenture upon the terms and conditions hereof, including the following, to all of which the parties hereto and the Holders from time to time of the Notes agree:

(a) Trustee Entitled to Compensation and Expenses. The Trustee shall be entitled to such compensation as is agreed upon in writing for all services rendered by it hereunder (which compensation shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust), and the Issuer agrees to pay such compensation, and all other reasonable expenses (including the fees and expenses of Trustee's counsel and experts), disbursements and advances incurred or made by the Trustee hereunder, promptly on demand from time to time as such services shall be rendered and as such expenses shall be incurred. Each of the Issuer and the Guarantors, jointly and severally, also agrees to indemnify each of the Trustee and any predecessor trustee hereunder for, and to hold it or them harmless against, any loss, liability, claim, damage or expense incurred without its or their own negligence or willful misconduct, arising out of or in connection with the acceptance or administration of the trust or trusts hereunder and the performance of its or their duties, as well as the costs and expenses of defending itself or themselves against any claim (whether asserted by the Issuer, a Holder or any other Person) or liability in connection with the exercise or performance of any of its or their powers or duties hereunder. As security for the performance of the obligations of the Issuer under this subsection (a), the Trustee shall have a lien therefor on any moneys or property held or collected by the Trustee hereunder prior to any rights therein of the Holders. When the Trustee incurs expenses or renders services in connection with an Event of Default specified in clause (4) or (5) of Section 6.01, the expenses (including the reasonable charges and expenses of its counsel and experts) and the compensation for the services are intended to constitute expenses of administration under any applicable Bankruptcy Law. Notwithstanding any provisions of this Indenture to the contrary, the obligations of the Issuer and the Guarantors to indemnify the Trustee under this Section 7.01(a) shall survive any satisfaction and discharge under Article 9, the termination of this Indenture or the resignation or removal of the Trustee.

(b) Trustee May Act by Agents and Attorneys. The Trustee may execute any of the trusts or powers hereof and perform any duty hereunder either directly or by its agents and attorneys and shall not be responsible for any misconduct or negligence on the part of any agent or attorney appointed with due care by it hereunder.

(c) Trustee Not Responsible for Recitals of Fact. The Trustee shall not be responsible in any manner whatsoever for the correctness of the recitals contained herein or in the Notes (except its certificates of authentication thereon) or the Guarantees, all of which are made by the Issuer solely; and the Trustee shall not be responsible or accountable in any manner whatsoever for or with respect to the validity or execution or sufficiency of this Indenture or of the Notes (except its certificates of authentication thereon) or the Guarantees, and the Trustee makes no representation with respect thereto. The Trustee shall not be accountable for the use or application by the Issuer of any Notes, or the proceeds of any Notes. Neither the Trustee nor the Collateral Agent shall be responsible for or make any representation as to the existence, genuineness, value or protection of any Collateral, for the legality, effectiveness or sufficiency of any Security Document, or for the creation, perfection, priority, sufficiency or protection of any Notes Liens. Neither the Trustee nor the Collateral Agent shall be responsible for filing any financing or continuation statements or recording any documents or instruments in any public office at any

time or times or otherwise perfecting or maintaining the perfection of any Lien or security interest in the Collateral.

(d) Trustee May Consult With Counsel. The Trustee may consult with counsel of its selection and, to the extent permitted by Section 7.02, the advice of such counsel or any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered to be taken by the Trustee hereunder in good faith and in accordance with such advice or Opinion of Counsel.

(e) Trustee May Rely Upon Certificate as to Adoption of Resolutions; Requests May Be Evidenced by Officer's Certificate. The Trustee, to the extent permitted by Section 7.02, may conclusively rely upon the certificate of the secretary or one of the assistant secretaries of the Issuer as to the adoption of any resolution by the Board of Directors or stockholders of the Issuer, and any request, direction, order or demand of the Issuer mentioned herein shall be sufficiently evidenced by, and whenever in the administration of this Indenture the Trustee shall deem it desirable that a matter be proved or established prior to taking, offering or omitting any action hereunder, the Trustee may conclusively rely upon an Officer's Certificate (unless other evidence in respect thereof be herein specifically prescribed).

(f) Trustee May Become Owner or Pledgee of Notes. The Trustee or any agent of the Trustee, in its individual or any other capacity, may become the owner or pledgee of Notes and, subject to Sections 7.06 and 7.09, may otherwise deal with the Issuer with the same rights it would have had if it were not a Trustee or such agent.

(g) Segregation of Funds. Money held by the Trustee in trust hereunder need not be segregated from other funds except to the extent required by law. The Trustee shall be under no liability for interest on any money received by it hereunder except as otherwise agreed in writing with the Issuer.

(h) Action at Request of or with Consent of Holder Binding on Future Holders. Any action taken by the Trustee pursuant to any provision hereof at the request or with the consent of any Person who at the time is the Holder of Notes shall be conclusive and binding in respect of any such Notes upon all future Holders thereof or of any Notes or other securities that may be issued for or in lieu thereof in whole or in part, whether or not such Note shall have noted thereon the fact that such request or consent had been made or given.

(i) Trustee May Rely on Instruments Believed by It to Be Genuine. Subject to the provisions of Section 7.02, the Trustee may conclusively rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval, bond, debenture or other paper or document (whether in original or facsimile form) believed by it to be genuine and to have been signed or presented by the proper party or parties.

(j) Trustee Need Not Exercise Rights or Powers Unless Indemnified by Holders. Subject to the provisions of Section 7.02, the Trustee shall not be under any obligation to exercise any of the rights or powers vested in it by this Indenture at the request, order or direction of any Holders, pursuant to any provision of this Indenture, unless one or more Holders shall have offered to the Trustee reasonable security or indemnity against the costs, expenses and liabilities that may be incurred by it therein or thereby.

(k) Trustee Not Liable for Action Taken or Omitted in Good Faith. Subject to the provisions of Section 7.02, the Trustee shall not be liable for any action taken or omitted by it in good faith and believed by it to be authorized or within its discretion or within the rights or powers conferred upon it by this Indenture.

(l) Trustee Not Bound to Make Investigation. Subject to the provisions of the first paragraph of Section 7.02, the Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval, bond, debenture or other paper or document.

(m) Trustee Not Deemed to Have Knowledge of Default. Subject to the provisions of Section 7.02, the Trustee shall not be deemed to have knowledge or notice of any Default or Event of Default unless a Responsible Officer of the Trustee has actual knowledge thereof or unless the Holders of not less than 25% in aggregate principal amount of the outstanding Notes notify the Trustee in writing thereof.

(n) Limitation on Liability. In no event shall the Trustee be responsible or liable for special, indirect, or consequential loss or damage of any kind whatsoever (including, but not limited to, loss of profit) irrespective of whether the Trustee has been advised of the likelihood of such loss or damage and regardless of the form of action.

(o) Agents Protected. The rights, privileges, protections, immunities and benefits given to the Trustee, including, without limitation, its right to be compensated, reimbursed and indemnified, are extended to, and shall be enforceable by, the Trustee in each of its capacities hereunder, and each Agent, custodian and other Person employed to act hereunder.

#### SECTION 7.02. Duties of Trustee in Case of Default.

If one or more Events of Default shall have happened, then, during the continuance thereof, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and shall use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

None of the provisions of this Indenture shall be construed as relieving the Trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct, except that, anything contained in this Indenture to the contrary notwithstanding:

(a) When No Default Subsisting. Unless and until an Event of Default with respect to the Notes of any series shall have happened, which at the time is continuing,

(i) the Trustee undertakes to perform such duties and only such duties with respect to the Notes as are specifically set out in this Indenture, and no implied covenants or obligations shall be read into this Indenture against the Trustee, whose duties and obligations shall be determined solely by the express provisions of this Indenture, and

(ii) the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, in the absence of bad faith on the part of the Trustee, upon certificates and opinions furnished to it pursuant to the express provisions of this Indenture; but in the case of any such certificates or opinions which, by the provisions of this Indenture, are specifically required to be furnished to the Trustee, the Trustee shall be under a duty to examine the same to determine whether or not they conform to the requirements of this Indenture.

(b) Trustee Not Liable for Error of Judgment Made in Good Faith by Responsible Officer. The Trustee shall not be liable to any Holder or to any other Person for error of judgment made in good faith by a Responsible Officer or Officers of the Trustee, unless it shall be proved that the Trustee was negligent in ascertaining the pertinent facts.



(c) Trustee Not Liable for Certain Action or Non-Action at Direction of Holders of Majority of Notes. The Trustee shall not be liable to any Holder or to any other Person with respect to any action taken or omitted to be taken by it in good faith, in accordance with the direction of Holders given as provided in Section 6.05, relating to the time, method and place of conducting any proceeding for any remedy available to it, or any action taken or omitted to be taken by it in good faith in accordance with the direction of the Holders of a majority of the Notes outstanding concerning the exercise of any trust or power conferred upon it by this Indenture.

None of the provisions of this Indenture shall be construed as requiring the Trustee to expend or risk its own funds or otherwise to incur any personal financial liability in the performance of any of its duties hereunder or in the exercise of any of its rights or remedies, if adequate indemnity against such risk or liability is not reasonably assured to it.

SECTION 7.03. Notice to Holders of Defaults.

Within 90 days after the occurrence thereof, the Trustee shall give to the Holders of the Notes notice of each Default known to the Trustee, unless such Default shall have been cured or waived before the giving of such notice; but, unless such Default be the failure to pay the principal of (or premium, if any) or interest on any of the Notes when and as the same shall become due and payable the Trustee shall be protected in withholding such notice, if and so long as the board of directors, the executive committee or a trust committee of directors or Responsible Officers of the Trustee in good faith determines that the withholding of such notice is in the interests of the Holders of the Notes.

SECTION 7.04. Resignation and Removal of Trustee and Notice Thereof.

The Trustee, or any successor to it hereafter appointed, may at any time resign and be discharged of the trusts hereby created with respect to the Notes by giving to the Issuer notice in writing and by mailing or electronically delivering notice thereof to the Holders of the Notes. Such resignation shall take effect upon the appointment of a successor Trustee by the Issuer and the acceptance of such appointment by such successor Trustee. Any Trustee hereunder may be removed with respect to the Notes at any time by the Holders of a majority in aggregate principal amount of the outstanding Notes, acting pursuant to the provisions of Article 8.

Upon its resignation or removal, any Trustee shall be entitled to the payment of reasonable compensation for the services rendered hereunder by such Trustee and to the payment of all reasonable expenses incurred hereunder and all moneys then due to it hereunder. The Trustee's rights to compensation, reimbursement and indemnification provided in Section 7.01(a) shall survive its resignation or removal.

SECTION 7.05. Qualifications of Trustee.

There shall at all times be a Trustee under this Indenture, and such Trustee shall at all times be a corporation organized and doing business under the laws of the United States or of any state thereof, which is authorized under such laws to exercise corporate trust powers and is subject to supervision or examination by federal or state authority and which has a combined capital and surplus of not less than \$50,000,000. For the purposes of this Section 7.05, the combined capital and surplus of any such Trustee shall be deemed to be the combined capital and surplus as set forth in the most recent report of its condition published by such Trustee; *provided* that such reports are published at least annually, pursuant to law or to the requirements of a federal or state supervising or examining authority. If such Trustee or any successor shall at any time cease to have the qualifications prescribed in this Section 7.05, it shall promptly resign as Trustee hereunder.



SECTION 7.06. Disqualification Of Trustee By Reason Of Conflicting Interest.

If the Trustee has or shall acquire a conflicting interest within the meaning of the Trust Indenture Act, the Trustee shall either eliminate such interest or resign, to the extent and in the manner provided by, and subject to the provisions of, the Trust Indenture Act and this Indenture.

SECTION 7.07. Appointment of Successor Trustee.

In case at any time the Trustee shall resign, or shall be removed, or shall become incapable of acting, or shall be adjudged a bankrupt or insolvent, or if a receiver of the Trustee or of its property shall be appointed, or if any public officer shall take charge or control of the Trustee or of its property of affairs for the purpose of rehabilitation, conservation or liquidation with respect to the Notes, the Issuer shall promptly appoint a successor Trustee. If a successor Trustee does not take office within 60 days after the retiring Trustee resigns, is removed, becomes incapable of acting, is adjudged a bankrupt or insolvent or is taken charge or control of as described in the preceding sentence, a successor Trustee may be appointed by the Holders of a majority in aggregate principal amount of the outstanding Notes, by an instrument or instruments in writing signed in duplicate by such Holders and filed, one original thereof with the Issuer and the other with the successor Trustee; but, until a successor Trustee shall have been so appointed by the Holders of Notes as herein authorized, the Issuer, or, in case all or substantially all the assets of the Issuer shall be in the possession of one or more Custodians or receivers lawfully appointed, or of trustees in bankruptcy or reorganization proceedings (including a trustee or trustees appointed under the provisions of the Federal bankruptcy laws, as now or hereafter constituted), or of assignees for the benefit of creditors, such receivers, Custodians, trustees or assignees, as the case may be, by an instrument in writing, shall appoint a successor Trustee with respect to the Notes. Subject to the provisions of Sections 7.04, 7.05 and 7.06, upon the appointment as aforesaid of a successor Trustee with respect to the Notes, the Trustee with respect of the Notes shall cease to be Trustee hereunder. After any such appointment (other than by the Holders of Notes) the person making such appointment shall forthwith cause notice thereof to be mailed or electronically delivered to the Holders of Notes at their addresses as the same shall then appear on the registry of the Notes maintained by the Registrar pursuant to Section 2.04; but any successor Trustee so appointed shall immediately and without further act be superseded by a successor Trustee appointed by the Holders of Notes in the manner above prescribed, if such appointment be made prior to the expiration of one year from the date of the mailing or electronic delivery of such notice by the Issuer, or by such receivers, trustees or assignees.

If any Trustee shall resign because of conflict of interest as provided in Section 7.06 and a successor Trustee shall not have been appointed by the Issuer or by the Holders of the Notes or, if any successor Trustee so appointed shall not have accepted its appointment within 30 days after such appointment shall have been made, the resigning Trustee may apply at the expense of the Issuer to any court of competent jurisdiction for the appointment of a successor Trustee. If in any other case a successor Trustee shall not be appointed pursuant to the foregoing provisions of this Section 7.07 within three months after such appointment might have been made hereunder, the Holder of any Note or any retiring Trustee may, at the expense of the Issuer, apply to any court of competent jurisdiction to appoint a successor Trustee. Such court may thereupon, in any such case, after such notice, if any, as such court may deem proper, appoint a successor Trustee.

Any successor Trustee appointed hereunder shall execute, acknowledge and deliver to its predecessor Trustee and to the Issuer, or to the receivers, trustees, assignees or court appointing it, as the case may be, an instrument accepting such appointment hereunder, and thereupon such successor Trustee, without any further act, deed or conveyance, shall become vested with all the authority, rights, powers, trusts, immunities, duties and obligations with respect to such series of such predecessor Trustee with like effect as if originally named as Trustee hereunder, and such predecessor Trustee, upon payment of its

charges and disbursements then unpaid, shall thereupon become obligated to pay over, and such successor Trustee shall be entitled to receive, all moneys and properties held by such predecessor Trustee as Trustee hereunder. Nevertheless, on the written request of the Issuer or of the successor Trustee or of the Holders of at least 10% in aggregate principal amount of the outstanding Notes, such predecessor Trustee, upon payment of its said charges and disbursements, shall execute and deliver an instrument transferring to such successor Trustee upon the trusts herein expressed all the rights, powers and trusts of such predecessor Trustee and shall assign, transfer and deliver to the successor Trustee all moneys and properties held by such predecessor Trustee; and, upon request of any such successor Trustee, the Issuer shall make, execute, acknowledge and deliver any and all instruments in writing for more fully and effectually vesting in and confirming to such successor Trustee all such authority, rights, powers, trusts, immunities, duties and obligations.

SECTION 7.08. Merger, Conversion or Consolidation of Trustee or Transfer of Its Corporate Trust Business; Authentication of Notes by Successor Trustee.

Any corporation into which the Trustee or any successor to it in the trusts created by this Indenture shall be merged or converted, or any corporation with which it or any successor to it shall be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Trustee or any such successor to it shall be a party, or any corporation to which the Trustee or any successor to it shall sell or otherwise transfer all or substantially all of the corporate trust business of the Trustee, shall be the successor Trustee under this Indenture without the execution or filing of any paper or any further act on the part of any of the parties hereto. In case at the time such successor to the Trustee shall succeed to the trusts created by this Indenture with respect to the Notes, any of the Notes shall have been authenticated but not delivered, any such successor to the Trustee may adopt the certificate of authentication of any predecessor Trustee, and deliver such Notes so authenticated; and in case at that time any of the Notes shall not have been authenticated, any successor to the Trustee may authenticate such Notes either in the name of any predecessor Trustee hereunder or in the name of the successor Trustee; and in all such cases such certificates shall have the full force which it is anywhere in the Notes or in this Indenture, *provided* that the certificate of the Trustee shall have.

SECTION 7.09. Trustee Required to Account for Amounts Collected As Creditor of the Issuer Under Certain Conditions.

If and when the Trustee shall be or become a creditor of the Issuer (or any other obligor upon the Notes), the Trustee shall be subject to the provisions of the Trust Indenture Act regarding the collection of claims against the Issuer (or any such other obligor).

SECTION 7.10. Trustee May Rely on Officer's Certificate.

Subject to Section 7.02, and subject to the provisions of Section 12.04 with respect to the certificates required thereby, whenever in the administration of the provisions of this Indenture the Trustee shall deem it necessary or desirable that a matter be proved or established prior to taking or suffering any action hereunder, such matter (unless other evidence in respect thereof be herein specifically prescribed) may, in the absence of negligence or bad faith on the part of the Trustee, be deemed to be conclusively proved and established by an Officer's Certificate with respect thereto delivered to the Trustee, and such Officer's Certificate, in the absence of negligence or willful misconduct on the part of the Trustee, shall be full warrant to the Trustee for any action taken, suffered to be taken or omitted by it under the provisions of this Indenture upon the faith thereof.

SECTION 7.11. Reports by Trustee.

(a) The Trustee shall transmit to Holders such reports concerning the Trustee and its actions under this Indenture as may be required pursuant to the Trust Indenture Act at the times and in the manner provided pursuant thereto. If required by Section 313(a) of the Trust Indenture Act, the Trustee shall, within sixty days after each March 15 following the date of this Indenture, deliver to Holders a brief report, dated as of such March 15, which complies with the provisions of such Section 313(a).

(b) A copy of each such report shall, at the time of such transmission to Holders, be filed by the Trustee with each stock exchange, if any, upon which the Notes are listed, with the Commission and with the Issuer. The Issuer will promptly notify the Trustee when the Notes are listed on any stock exchange and of any delisting thereof.

SECTION 7.12. Collateral Agent.

The rights, privileges, protections, immunities and benefits given to the Trustee, including, without limitation, its right to be compensated, reimbursed and indemnified, are extended to, and shall be enforceable by, the Collateral Agent as if the Collateral Agent were named as the Trustee herein and the Security Documents were named as this Indenture herein.

ARTICLE EIGHT

AMENDMENTS, SUPPLEMENTS AND WAIVERS

SECTION 8.01. Without Consent of Holders.

The Issuer, the Guarantors and the Trustee (or the Collateral Agent, if a party thereto) may amend, waive or supplement this Indenture, the Notes and the Security Documents, without prior notice to or consent of any Holder:

- (1) to issue Additional Notes under this Indenture;
- (2) to cure any ambiguity, omission, defect or inconsistency;
- (3) to provide for the assumption by a successor of the obligations of the Issuer under this Indenture and the Notes, or provide for the assumption by a successor of the obligations of a Guarantor under this Indenture, in each case, to the extent otherwise permitted under this Indenture;
- (4) to comply with requirements of the Commission in order to effect or maintain the qualification of this Indenture under the Trust Indenture Act;
- (5) to make any change that would provide any additional rights or benefits to the Holders of Notes or that does not adversely affect the legal rights under this Indenture of any such Holder;
- (6) to add additional Guarantees of the Notes or additional assets as Collateral;
- (7) to release a Guarantor as provided in section 10.04;

(8) to allow for the addition of Additional First Lien Obligations and Pari Passu Junior Lien Obligations under the Security Documents (including by way of entry into an additional Intercreditor Agreement) to the extent not prohibited by this Indenture (including, in the case of Pari Passu Junior Lien Obligations that are not secured by the Security Agreement, to enter into conforming modifications to the Intercreditor Agreement or an additional intercreditor agreement with any collateral agent for the holders of such obligations providing that the Liens of the Collateral Agent and such other collateral agent on any Collateral shall be pari passu and that amounts received in connection with an enforcement of the Notes Liens or the Liens securing such Pari Passu Junior Lien Obligations (or received in respect of such Liens in any bankruptcy or insolvency proceeding) shall, after payment of expenses of the Collateral Agent and the collateral agent for each other class of Pari Passu Junior Lien Obligations, be distributed to the Trustee and the agent(s) for the holders of Pari Passu Junior Lien Obligations on a pro rata basis based on the amount of outstanding obligations of each such class);

(9) release Guarantees and/or Collateral as otherwise permitted in this Indenture and the Security Documents;

(10) to provide for uncertificated Notes in addition to, or in place of, certificated Notes; or

(11) to add to the covenants of the Issuer or a Guarantor for the benefit of the Holders of the Notes or to surrender any right or power conferred upon the Issuer or a Guarantor.

SECTION 8.02. With Consent of Holders.

(a) This Indenture, the Notes or the Security Documents may be amended or supplemented by the Issuer, the Guarantors and the Trustee (or the Collateral Agent, if a party thereto) with the consent of the Holders of at least a majority in aggregate principal amount of the Notes then outstanding (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes), and any existing Default under, or compliance with any provision of each of this Indenture or the Notes may be waived (except a Default in respect of the payment of principal or interest on the Notes) with the consent of the Holders of a majority in aggregate principal amount of the then outstanding Notes (including, without limitation, consents obtained in connection with any purchase of, or tender offer or exchange offer for, Notes).

(b) Without the consent of each Holder affected, an amendment, supplement or waiver of this Indenture may not:

- (1) extend the fixed maturity of the Notes,
- (2) reduce the rate or extend the time of payment of interest on the Notes,
- (3) reduce the principal amount or the premium, if any, of the Notes or reduce the amount of the principal payable on any date,
- (4) change the coin or currency in which principal of or any premium or interest on any Notes are payable, or
- (5) impair the right to institute suit for the enforcement of any such payment on or after the maturity thereof.



(c) Furthermore, an amendment, supplement or waiver of this Indenture may not:

(1) reduce the percentage of Notes, the consent of the Holders of which is required for any such modification without the consent of the Holders of all Notes then outstanding (including Notes held by Affiliates of the Issuer);

(2) modify without the written consent of the Trustee the rights, duties or immunities of the Trustee; or

(3) except as expressly permitted under this Indenture, (i) release all or substantially all of the Collateral from the Liens securing the Notes or (ii) release one or more Guarantors from their Guarantees (or otherwise limit the liability of one or more Guarantors with respect to their obligations under their Guarantees) if such release or limitation is in respect of substantially all of the value provided by all Guarantors under the Guarantees, in each case without the consent of Holders of at least 75% in aggregate principal amount of the outstanding Notes.

After an amendment, supplement or waiver under this Section 8.02 becomes effective, the Issuer shall mail or electronically deliver to each Holder affected thereby a notice briefly describing the amendment, supplement or waiver.

Upon the written request of the Issuer and upon the receipt by the Trustee of evidence reasonably satisfactory to the Trustee of the consent of the Holders as aforesaid and upon receipt by the Trustee of the documents described in Section 8.06, the Trustee shall join with the Issuer and the Guarantors in the execution of such amended or supplemental indenture unless such amended or supplemental indenture affects the Trustee's own rights, duties or immunities under this Indenture, in which case the Trustee may, but shall not be obligated to, enter into such amended or supplemental indenture. It shall not be necessary for the consent of the Holders under this Section 8.02 to approve the particular form of any proposed amendment, supplement or waiver, but it shall be sufficient if such consent approves the substance thereof.

#### SECTION 8.03. Compliance with Trust Indenture Act.

Every amendment or supplement to this Indenture, the Notes or the Guarantees shall comply with the TIA as then in effect.

#### SECTION 8.04. Revocation and Effect of Consents.

Until an amendment, supplement, waiver or other action becomes effective, a consent to it by a Holder of a Note is a continuing consent conclusive and binding upon such Holder and every subsequent Holder of the same Note or portion thereof, and of any Note issued upon the transfer thereof or in exchange therefor or in place thereof, even if notation of the consent is not made on any such Note. Any such Holder or subsequent Holder, however, may revoke the consent as to his Note or portion of a Note, if the Trustee receives the written notice of revocation before the date the amendment, supplement, waiver or other action becomes effective.

The Issuer may, but shall not be obligated to, fix a record date for the purpose of determining the Holders entitled to consent to any amendment, supplement, or waiver. If a record date is fixed, then, notwithstanding the preceding paragraph, those Persons who were Holders at such record date (or their duly designated proxies), and only such Persons, shall be entitled to consent to such amendment, supplement, or waiver or to revoke any consent previously given, whether or not such Persons continue to



be Holders after such record date. No such consent shall be valid or effective for more than 120 days after such record date unless the consent of the requisite number of Holders has been obtained.

After an amendment, supplement, waiver or other action becomes effective, it shall bind every Holder.

SECTION 8.05. Notation on or Exchange of Notes.

If an amendment, supplement, or waiver changes the terms of a Note, the Trustee (in accordance with the specific written direction of the Issuer) shall request the Holder of the Note (in accordance with the specific written direction of the Issuer) to deliver it to the Trustee. In such case, the Trustee shall place an appropriate notation on the Note about the changed terms and return it to the Holder. Alternatively, if the Issuer or the Trustee so determines, the Issuer in exchange for the Note shall issue, the Guarantors shall endorse, and the Trustee shall authenticate a new Note that reflects the changed terms. Failure to make the appropriate notation or issue a new Note shall not affect the validity and effect of such amendment, supplement or waiver.

SECTION 8.06. Trustee to Sign Amendments, Etc.

The Trustee or Collateral Agent, as the case may be, shall sign any amendment, supplement or waiver authorized pursuant to this Article Eight if the amendment, supplement or waiver does not adversely affect the rights, duties, liabilities or immunities of the Trustee or the Collateral Agent. If it does, the Trustee or the Collateral Agent, as the case may be, may, but need not, sign it. In signing or refusing to sign such amendment, supplement or waiver the Trustee or the Collateral Agent, as the case may be, shall be entitled to receive and, subject to Section 7.02, shall be fully protected in relying upon an Officer's Certificate and an Opinion of Counsel stating, in addition to the matters required by Section 12.04, that such amendment, supplement or waiver is authorized or permitted by this Indenture and all conditions precedent required hereunder to such amendment, supplement or waiver have been satisfied.

ARTICLE NINE

DISCHARGE OF INDENTURE; DEFEASANCE

SECTION 9.01. Discharge of Indenture.

(a) The Issuer may terminate its obligations and the obligations of the Guarantors under the Notes, the Guarantees and this Indenture, except the obligations referred to in the last paragraph of this Section 9.01, if

(1) all Notes that have been authenticated, except lost, stolen or destroyed Notes that have been replaced or paid and Notes for whose payment money has been deposited in trust or segregated and held in trust by the Issuer and thereafter repaid to the Issuer or discharged from such trust, have been delivered to the Trustee for cancellation, or

(2) (A) all Notes not delivered to the Trustee for cancellation otherwise (x) have become due and payable by reason of the mailing or electronic delivery of a notice of redemption or otherwise, (y) will become due and payable by reason of the mailing or electronic delivery of a notice of redemption or otherwise, or may be called for redemption within one year or (B) have been called for redemption pursuant to Section 3.07 and, in any case, the Issuer has irrevocably deposited or caused to be deposited with the Trustee as trust funds, in trust solely for the benefit of the Holders, cash in U.S. Dollars, Government Securities, or a combination

thereof, in amounts as will be sufficient (without consideration of any reinvestment of such principal and interest), in the opinion of a nationally recognized firm of independent public accountants expressed in a written certification thereof delivered to the Trustee, to pay and discharge the entire indebtedness on the Notes not theretofore delivered to the Trustee for cancellation for principal, premium and Additional Interest, if any, and accrued interest through the date of maturity or redemption,

(b) the Issuer has paid or caused to be paid all sums payable by it under this Indenture, and

(c) the Issuer has delivered irrevocable instructions to the Trustee to apply the deposited money or proceeds from Government Securities toward the payment of the Notes at maturity or the Redemption Date, as the case may be.

In addition, if the Issuer delivers an Officer's Certificate and an Opinion of Counsel stating that all conditions precedent to satisfaction and discharge have been complied with, the Trustee shall acknowledge in writing the discharge of the Issuer's and the Guarantors' obligations under the Notes, the Guarantees and this Indenture except for those surviving obligations specified below.

Notwithstanding the satisfaction and discharge of this Indenture, the obligations of the Issuer in Sections 7.01(a), 9.04 and 9.05 shall survive such satisfaction and discharge.

#### SECTION 9.02. Legal Defeasance.

(a) The Issuer may at its option be discharged from its obligations with respect to the Notes and the Guarantors discharged from their obligations under the Guarantees on the date the conditions set forth in clause (b) of this Section 9.02 are satisfied (hereinafter, "Legal Defeasance"). For this purpose, such Legal Defeasance means that the Issuer shall be deemed to have paid and discharged the entire indebtedness represented by the Notes and to have satisfied all its other obligations under such Notes and this Indenture insofar as such Notes are concerned (and the Trustee, at the expense of the Issuer, shall, subject to Section 9.05, execute instruments in form and substance reasonably satisfactory to the Trustee and Issuer acknowledging the same), except for the following which shall survive until otherwise terminated or discharged hereunder: (A) the rights of Holders to receive solely from the trust funds described in clause (b) of this Section 9.02 and as more fully set forth in Section 9.04, payments in respect of the principal of, premium and Additional Interest, if any, and interest on such Notes when such payments are due from the trust referred to in clause (b) of this Section 9.02, (B) the Issuer's obligations hereunder with respect to such Notes concerning issuing temporary Notes, registration of Notes, mutilated, destroyed, lost or stolen Notes and the maintenance of an office or agency for payment and money for security payments held in trust, (C) the rights, powers, trusts, duties, and immunities of the Trustee hereunder (including claims of, or payments to, the Trustee under or pursuant to Section 7.01(a)), and the Issuer's obligations in connection therewith, and (D) this Article Nine. Subject to compliance with this Article Nine, the Issuer may exercise its option under this Section 9.02 with respect to the Notes notwithstanding the prior exercise of its option under Section 9.03 with respect to the Notes.

(b) The following shall be the conditions to the application of Section 9.02(a) to the outstanding Notes:

(i) the Issuer shall have deposited with the Trustee, in trust, money and/or Government Securities that through the payment of interest and principal in respect thereof in accordance with their terms will provide money in an amount sufficient (without consideration of any reinvestment of such principal and interest), in the opinion of a nationally recognized firm of inde-

pendent public accountants expressed in a written certification thereof delivered to the Trustee, to pay the principal of, premium, if any, and accrued interest on the Notes on the stated maturity of such payments in accordance with the terms of the Indenture and the Notes;

(ii) the Issuer shall have delivered to the Trustee either (x) an Opinion of Counsel to the effect that the beneficial owners of the Notes will not recognize income, gain or loss for U.S. federal income tax purposes as a result of the exercise of the option of the Issuer under clause (a) of this Section 9.02 and will be subject to U.S. federal income tax on the same amount and in the same manner and at the same times as would have been the case if such deposit, defeasance and discharge had not occurred, which Opinion of Counsel must be based upon (and accompanied by a copy of) a published ruling of the Internal Revenue Service or other change in applicable U.S. federal income tax law after the Issue Date to the same effect or (y) a ruling directed to the Trustee received from the Internal Revenue Service to the same effect as the aforementioned Opinion of Counsel;

(iii) immediately after giving effect to such deposit on a pro forma basis, no Default or Event of Default shall have occurred and be continuing on the date of such deposit and such deposit shall not result in a breach or violation of, or constitute a default under, any other material agreement or instrument to which the Issuer or any of its Subsidiaries is a party or by which the Issuer or any of its Subsidiaries is bound; and

(iv) the Issuer delivers to the Trustee an Officer's Certificate and an Opinion of Counsel stating that all conditions precedent to such Legal Defeasance have been complied with.

#### SECTION 9.03. Covenant Defeasance.

(a) At the option of the Issuer, (x) the Issuer and the Guarantors shall be released from their respective obligations under Sections 4.02 (except for obligations mandated by the TIA) and 4.03 through 4.09 and (y) clause (3) of Section 6.01 shall no longer apply with respect to the outstanding Notes on and after the date the conditions set forth in clause (b) of this Section 9.03 are satisfied (hereinafter, "Covenant Defeasance"). For this purpose, such Covenant Defeasance means that the Issuer and the Guarantors may omit to comply with and shall have no liability in respect of any term, condition or limitation set forth in any such specified Section or portion thereof, whether directly or indirectly by reason of any reference elsewhere herein to any such specified Section or portion thereof or by reason of any reference in any such specified Section or portion thereof to any other provision herein or in any other document, but the remainder of this Indenture and the Notes shall be unaffected thereby.

(b) The following shall be the conditions to the application of Section 9.03(a) to the outstanding Notes:

(i) the deposit with the Trustee, in trust, of U.S. legal tender and/or Government Securities that through the payment of interest and principal in respect thereof in accordance with their terms will provide money in an amount sufficient (without consideration of any reinvestment of such principal and interest), in the opinion of a nationally recognized firm of independent public accountants expressed in a written certification thereof delivered to the Trustee, to pay the principal of, premium, if any, and accrued interest on the Notes on the scheduled maturity of such payments in accordance with the terms of this Indenture and the Notes;

(ii) the delivery by the Issuer to the Trustee of an Opinion of Counsel to the effect that the beneficial owners of the outstanding Notes will not recognize income, gain or loss for U.S. federal income tax purposes as a result of such deposit and defeasance of certain covenants

and will be subject to U.S. federal income tax on the same amount and in the same manner and at the same times as would have been the case if such deposit and defeasance had not occurred;

(iii) immediately after giving effect to such deposit on a pro forma basis, no Default or Event of Default shall have occurred and be continuing on the date of such deposit and such deposit shall not result in a breach or violation of, or constitute a default under, any other material agreement or instrument to which the Issuer or any of its Subsidiaries is a party or by which the Issuer or any of its Subsidiaries is bound; and

(iv) the Issuer delivers to the Trustee an Officer's Certificate and an Opinion of Counsel stating that all conditions precedent to such Covenant Defeasance have been complied with.

SECTION 9.04. Deposited Money and Government Securities to Be Held in Trust: Other Miscellaneous Provisions.

All money and Government Securities (including the proceeds thereof) deposited with the Trustee pursuant to Section 9.02(b) or 9.03(b) in respect of the outstanding Notes shall be held in trust and applied by the Trustee, in accordance with the provisions of such Notes and this Indenture, to the payment, either directly or through any Paying Agent (including the Issuer acting as Paying Agent), to the Holders of such Notes, of all sums due and to become due thereon in respect of principal, premium, if any, and accrued interest, but such money need not be segregated from other funds except to the extent required by law.

The Issuer and the Guarantors shall (on a joint and several basis) pay and indemnify the Trustee against any tax, fee or other charge imposed on or assessed against the Government Securities deposited pursuant to Section 9.02(b) or 9.03(b) or the principal, premium, if any, and interest received in respect thereof other than any such tax, fee or other charge which by law is for the account of the Holders of the outstanding Notes.

Anything in this Article Nine to the contrary notwithstanding, the Trustee shall deliver or pay to the Issuer from time to time any money or Government Securities held by it as provided in Section 9.02(b) and 9.03(b) which, in the opinion of a nationally recognized firm of independent public accountants expressed in a written certification thereof delivered to the Trustee, are in excess of the amount thereof which would then be required to be deposited to effect an equivalent Legal Defeasance or Covenant Defeasance.

SECTION 9.05. Reinstatement.

If the Trustee or Paying Agent is unable to apply any U.S. Dollars or Government Securities in accordance with Section 9.01, 9.02 or 9.03 by reason of any legal proceeding or by reason of any order or judgment of any court or governmental authority enjoining, restraining or otherwise prohibiting such application, the Issuer's and each Guarantor's obligations under this Indenture, the Notes and the Guarantees shall be revived and reinstated as though no deposit had occurred pursuant to this Article Nine until such time as the Trustee or Paying Agent is permitted to apply all such U.S. Dollars or Government Securities in accordance with Section 9.01, 9.02 or 9.03, as the case may be; *provided* that if the Issuer or the Guarantors have made any payment of principal of, premium, if any, or accrued interest on any Notes because of the reinstatement of their obligations, the Issuer or the Guarantors, as the case may be, shall be subrogated to the rights of the Holders of such Notes to receive such payment from the U.S. Dollars or Government Securities held by the Trustee or Paying Agent.



SECTION 9.06. Moneys Held by Paying Agent.

In connection with the satisfaction and discharge of this Indenture, all moneys then held by any Paying Agent under the provisions of this Indenture shall, upon written demand of the Issuer, be paid to the Trustee, or if sufficient moneys have been deposited pursuant to Section 9.02(b) or 9.03(b), to the Issuer (or, if such moneys had been deposited by the Guarantors, to such Guarantors), and thereupon such Paying Agent shall be released from all further liability with respect to such moneys.

SECTION 9.07. Moneys Held by Trustee.

Subject to applicable law, any moneys deposited with the Trustee or any Paying Agent or then held by the Issuer or the Guarantors in trust for the payment of the principal of, or premium, if any, or interest on any Note that are not applied but remain unclaimed by the Holder of such Note for two years after the date upon which the principal of, or premium, if any, or interest on such Note shall have respectively become due and payable shall be repaid to the Issuer (or, if appropriate, the Guarantors), or if such moneys are then held by the Issuer or the Guarantors in trust, such moneys shall be released from such trust; and the Holder of such Note entitled to receive such payment shall thereafter, as an unsecured general creditor, look only to the Issuer and the Guarantors for the payment thereof, and all liability of the Trustee or such Paying Agent with respect to such trust money shall thereupon cease; *provided* that the Trustee or any such Paying Agent, before being required to make any such repayment, may, at the expense of the Issuer and the Guarantors, either mail or electronically deliver to each Holder affected, at the address shown in the register of the Notes maintained by the Registrar pursuant to Section 2.06, or cause to be published once a week for two successive weeks, in a newspaper published in the English language, customarily published each Business Day and of general circulation in the City of New York, New York or the United States, a notice that such money remains unclaimed and that, after a date specified therein, which shall not be less than 30 days from the date of such mailing, electronic delivery or publication, any unclaimed balance of such moneys then remaining will be repaid to the Issuer. After payment to the Issuer or the Guarantors or the release of any money held in trust by the Issuer or any Guarantors, as the case may be, Holders entitled to the money must look only to the Issuer and the Guarantors for payment as general unsecured creditors unless applicable abandoned property law designates another Person.

ARTICLE TEN

GUARANTEE OF NOTES

SECTION 10.01. Guarantee.

Subject to the provisions of this Article Ten, each Guarantor, by execution of this Indenture, jointly and severally, unconditionally guarantees to each Holder and to the Trustee and their respective successors and assigns (i) the due and punctual payment of the principal of and interest and premium, if any, on each Note, when and as the same shall become due and payable, whether at maturity, by acceleration, required purchase or otherwise, the due and punctual payment of interest on the overdue principal of and interest on the Notes, to the extent lawful, and the due and punctual payment of all other Obligations of the Issuer to the Holders or the Trustee all in accordance with the terms of such Note, this Indenture and the Registration Rights Agreements, and (ii) in the case of any extension of time of payment or renewal of any Notes or any of such other Obligations, that the same will be promptly paid in full when due or performed in accordance with the terms of the extension or renewal, whether at stated maturity, by acceleration, required purchase or otherwise. Each Guarantor, by execution of this Indenture, agrees that its obligations hereunder shall be absolute and unconditional, irrespective of, and shall be unaffected by, any invalidity, irregularity or unenforceability of any such Note or this Indenture, any failure to enforce the provisions of any such Note, this Indenture or the Registration Rights Agreements, any waiver, modi-



fication or indulgence granted to the Issuer or any other Guarantor with respect thereto by the Holder of such Note, or any other circumstances which may otherwise constitute a legal or equitable discharge of a surety or such Guarantor.

Each Guarantor hereby waives diligence, presentment, demand for payment, filing of claims with a court in the event of insolvency or bankruptcy of the Issuer, any right to require a proceeding first against the Issuer, protest or notice with respect to any such Note or the Indebtedness evidenced thereby and all demands whatsoever, and covenants that this Guarantee will not be discharged as to any such Note except by payment in full of the principal thereof and interest thereon. Each Guarantor hereby agrees that, as between such Guarantor, on the one hand, and the Holders and the Trustee, on the other hand, (i) subject to this Article Ten, the maturity of the Obligations guaranteed hereby may be accelerated as provided in Article Six for the purposes of this Guarantee, notwithstanding any stay, injunction or other prohibition preventing such acceleration in respect of the Obligations guaranteed hereby, and (ii) in the event of any declaration of acceleration of such Obligations as provided in Article Six, subject to any rescission thereof pursuant to Section 6.04, such Obligations (whether or not due and payable) shall forthwith become due and payable by each Guarantor for the purpose of this Guarantee.

SECTION 10.02. Execution and Delivery of Notation of Guarantee.

To further evidence the Guarantee set forth in Section 10.01, each Guarantor hereby agrees that a notation of such Guarantee, substantially in the form included in Exhibit G hereto, shall be endorsed on each Note authenticated and delivered by the Trustee and such Guarantee shall be executed by either manual or facsimile signature of an Officer or an Officer of a general partner or member, as the case may be, of each Guarantor. The validity and enforceability of any Guarantee shall not be affected by the fact that it is not affixed to any particular Note.

Each of the Guarantors hereby agrees that its Guarantee set forth in Section 10.01 shall remain in full force and effect notwithstanding any failure to endorse on each Note a notation of such Guarantee.

If an Officer of a Guarantor (or general partner or member thereof) whose signature is on this Indenture or a notation of Guarantee no longer holds that office at the time the Trustee authenticates the Note on which such Guarantee is endorsed or at any time thereafter, such Guarantor's Guarantee of such Note shall be valid nevertheless.

The delivery of any Note by the Trustee, after the authentication thereof hereunder, shall constitute due delivery of any Guarantee set forth in this Indenture on behalf of the Guarantor.

SECTION 10.03. Limitation of Guarantee.

Each Guarantor, the Trustee, and by its acceptance of Notes, each Holder, hereby confirms that it is the intention of all such parties that the Guarantee of such Guarantor not constitute a fraudulent transfer or conveyance for purposes of any Bankruptcy Law, the Uniform Fraudulent Conveyance Act, the Uniform Fraudulent Transfer Act or any similar federal or state law to the extent applicable to any Guarantee. To effectuate the foregoing intention, the Trustee, the Holders and the Guarantors hereby irrevocably agree that the obligations of each Guarantor are limited to the maximum amount as will, after giving effect to all other contingent and fixed liabilities of such Guarantor and after giving effect to any collections from or payments made by or on behalf of any other Guarantor in respect of the obligations of such other Guarantor under its Guarantee or pursuant to its contribution obligations under this Indenture, result in the obligations of such Guarantor under its Guarantee not constituting a fraudulent conveyance or fraudulent transfer under federal or state law. Each Guarantor that makes a payment or

distribution under a Guarantee shall be entitled to a contribution from each other Guarantor in a *pro rata* amount based on the assets of each Guarantor.

SECTION 10.04. Release of Guarantor.

A Guarantor shall be automatically and unconditionally released from all of its obligations under its Guarantee:

(i) in the event of a sale or other transfer of Equity Interests in such Guarantor or dissolution of such Guarantor in compliance with the terms of this Indenture following which such Guarantor ceases to be a Subsidiary;

(ii) upon such Guarantor ceasing to be a borrower or guarantor under any Credit Agreement and the Issuer's delivery of an Officer's Certificate to the Trustee requesting the release and an Opinion of Counsel, each stating that all conditions precedent herein provided for relating to such transactions have been complied with and that such release is authorized and permitted hereunder; or

(iii) in connection with a discharge of this Indenture pursuant to Section 9.01 or Covenant Defeasance or Legal Defeasance.

and in each such case, the Issuer has delivered to the Trustee an Officer's Certificate and an Opinion of Counsel, each stating that all conditions precedent herein provided for relating to such transactions have been complied with and that such release is authorized and permitted hereunder.

Upon being provided the Officer's Certificate and Opinion of Counsel mentioned in clause (ii) above, the Trustee shall execute any documents reasonably requested by the Issuer or a Guarantor in order to evidence the release of such Guarantor from its obligations under its Guarantee endorsed on the Notes and under this Article Ten.

SECTION 10.05. Waiver of Subrogation.

Each Guarantor hereby irrevocably waives any claim or other rights which it may now or hereafter acquire against the Issuer that arise from the existence, payment, performance or enforcement of such Guarantor's obligations under its Guarantee and this Indenture, including, without limitation, any right of subrogation, reimbursement, exoneration, indemnification, and any right to participate in any claim or remedy of any Holder of Notes against the Issuer, whether or not such claim, remedy or right arises in equity, or under contract, statute or common law, including, without limitation, the right to take or receive from the Issuer, directly or indirectly, in cash or other property or by set-off or in any other manner, payment or Security on account of such claim or other rights. If any amount shall be paid to any Guarantor in violation of the preceding sentence and the Notes shall not have been paid in full, such amount shall have been deemed to have been paid to such Guarantor for the benefit of, and held in trust for the benefit of, the Holders, and shall forthwith be paid to the Trustee for the benefit of such Holders to be credited and applied upon the Notes, whether matured or unmatured, in accordance with the terms of this Indenture. Each Guarantor acknowledges that it will receive direct and indirect benefits from the financing arrangements contemplated by this Indenture and that the waiver set forth in this Section 10.05 is knowingly made in contemplation of such benefits.

ARTICLE ELEVEN

SECURITY

SECTION 11.01. Security Documents; Additional Collateral.

(a) Security Documents. In order to secure the due and punctual payment of the Obligations outstanding under the Notes and the Guarantees, the Issuer, the Guarantors, the Collateral Agent and the other parties thereto have simultaneously with the execution of this Indenture entered or, in accordance with the provisions of this Article Eleven and the provisions of the Security Agreement, will enter into the Security Documents.

(b) The Issuer shall, and shall cause each Guarantor to, and each Guarantor shall, make all filings (including filings of continuation statements and amendments to financing statements that may be necessary to continue the effectiveness of such financing statements) and take all other actions as are necessary or required by the Security Documents to maintain (at the sole cost and expense of the Issuer and its Guarantors) the security interest created by the Security Documents in the Collateral (other than with respect to any Collateral the security interest in which is not required to be perfected under the Security Documents) as a perfected security interest subject only to Permitted Liens.

(c) Additional Collateral. With respect to assets acquired after the Issue Date, the Issuer or applicable Guarantor will take the actions required by the Security Agreement.

SECTION 11.02. Recording, Registration and Opinions.

The Issuer and the Guarantors shall furnish to the Trustee, (a) upon or no later than 30 days following the Issue Date, an Opinion of Counsel stating that this Indenture or the Security Documents or financing statements with respect thereto, as applicable, have been properly recorded and filed so as to make the Notes Liens effective, and reciting the details of such action, and (b) at least 30 days prior to the anniversary of the Issue Date in each year an Opinion of Counsel, dated as of such date, either (i) stating that, in the opinion of such counsel, such action has been taken with respect to the recording, filing, re-recording, and re-filing of this Indenture or the Security Documents, as applicable, as are necessary to maintain the Notes Liens under applicable law to the extent required by the Security Documents other than any action as described therein to be taken and such opinion may refer to prior Opinions of Counsel and contain customary qualifications and exceptions and may rely on an Officer's Certificate of the Issuer or (ii) stating that, in the opinion of such counsel, no such action is necessary to maintain such Notes Liens or security interests.

SECTION 11.03. Releases of Liens on Collateral.

The Liens on the Collateral pursuant to the Security Documents shall automatically and without the need for any further action by any Person be released:

(a) as to any property, or portion thereof, subject to such Liens which has been taken by eminent domain, condemnation or other similar circumstances;

(b) in whole, upon:

(i) a satisfaction and discharge of this Indenture under Section 9.01 hereof;  
or

(ii) a Legal Defeasance or Covenant Defeasance of this Indenture under Section 9.02 or Section 9.03, respectively;

(c) as to any property that (i) is sold, transferred or otherwise disposed of by the Issuer or any Guarantor (other than to the Issuer or another Guarantor) in a transaction not prohibited by this Indenture at the time of such transfer or disposition or (ii) is owned or at any time acquired by a Guarantor that has been released from its Guarantee, concurrently with the release of such Guarantee;

(d) in whole or in part, in accordance with the applicable provisions of the Intercreditor Agreement;

(e) in whole or in part, in accordance with Section 8.01 or 8.02; and

(f) in whole, upon the occurrence of a Fall-Away Event.

To the extent applicable, the Issuer shall comply with TIA § 314(b) and, following qualification of the Indenture under the TIA (if required), TIA § 314(d). Any certificate or opinion required by TIA § 314(d) may be made by an Officer of the Issuer except in cases where TIA § 314(d) requires that such certificate or opinion be made by an independent engineer, appraiser or other expert appointed by the Issuer, who shall be approved by the Trustee.

SECTION 11.04. Form and Sufficiency of Release.

In the event that any Lien is to be released pursuant to Section 11.03, and the Issuer or such Guarantor requests the Collateral Agent to furnish a written disclaimer, release or quitclaim of any interest in such property under the Security Documents, upon receipt of an Officer's Certificate and Opinion of Counsel to the effect that such release complies with Section 11.03 and specifying the provision in Section 11.03 pursuant to which such release is being made (upon which the Trustee and Collateral Agent may exclusively and conclusively rely), the Collateral Agent shall execute, acknowledge and deliver to the Issuer or such Guarantor such an instrument in the form provided by the Issuer, and providing for release without recourse and shall take such other action as the Issuer or such Guarantor may reasonably request and as necessary to effect such release.

SECTION 11.05. Possession and Use of Collateral.

Subject to the provisions of this Indenture and the Security Documents, the Issuer and the Guarantors shall have the right to remain in possession and retain exclusive control of and to exercise all rights with respect to the Collateral, to freely operate, manage, develop, lease, use, consume and enjoy the Collateral, to alter or repair any Collateral so long as such alterations and repairs do not impair the Lien of the Security Documents thereon, and to collect, receive, use, invest and dispose of the reversions, remainders, interest, rents, lease payments, issues, profits, revenues, proceeds and other income thereof.

SECTION 11.06. Purchaser Protected.

No purchaser or grantee of any property or rights purporting to be released shall be bound to ascertain the authority of the Collateral Agent to execute the release or to inquire as to the existence of any conditions herein prescribed for the exercise of such authority so long as the conditions set forth in Section 11.04 have been satisfied.

SECTION 11.07. Authorization of Actions To Be Taken by the Collateral Agent Under the Security Documents.

The Holders of Notes agree that the Collateral Agent shall be entitled to the rights, privileges, protections, immunities, indemnities and benefits provided to the Collateral Agent by the Security Documents. Furthermore, each Holder of a Note, by accepting such Note, agrees, acknowledges and consents to the terms (including, but not limited to, waivers, representations and covenants) of and authorizes and directs the Trustee (in each of its capacities) and the Collateral Agent to enter into and perform the Security Documents in each of its capacities thereunder.

SECTION 11.08. Authorization of Receipt of Funds by the Trustee Under the Security Agreement.

The Trustee is authorized to receive any funds for the benefit of Holders distributed under the Security Documents to the Trustee and to apply such funds as provided in Section 6.11.

SECTION 11.09. Powers Exercisable by Receiver or Collateral Agent.

In case the Collateral shall be in the possession of a receiver or trustee, lawfully appointed, the powers conferred in this Article Eleven upon the Issuer or any Guarantor, as applicable, with respect to the release, sale or other disposition of such property may be exercised by such receiver or trustee, and an instrument signed by such receiver or trustee shall be deemed the equivalent of any similar instrument of the Issuer or any Guarantor, as applicable, or of any officer or officers thereof required by the provisions of this Article Eleven.

ARTICLE TWELVE

MISCELLANEOUS

SECTION 12.01. Trust Indenture Act Controls.

Except as otherwise specified herein, if any provision of this Indenture limits, qualifies or conflicts with another provision which is required to be included in this Indenture by the TIA, the required provision shall control. If any provision of this Indenture modifies any TIA provision that may be so modified, such TIA provision shall be deemed to apply to this Indenture as so modified. If any provision of this Indenture excludes any TIA provision that may be so excluded, such TIA provision shall be excluded from this Indenture.

The provisions of TIA §§ 310 through 317 that impose duties on any Person (including the provisions automatically deemed included unless expressly excluded by this Indenture) are a part of and govern this Indenture, whether or not physically contained herein.

SECTION 12.02. Notices.

Except for notice or communications to Holders, any notice or communication shall be given in writing and delivered in person, sent by telecopy, delivered electronically, delivered by commercial courier service or mailed by first-class mail, postage prepaid, addressed as follows:



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If to the Issuer or any Guarantor:

Sears Holdings Corporation  
3333 Beverly Road  
Hoffman Estates, Illinois 60179  
Facsimile: (847) 286-2055  
Attention: Treasurer

copy to:

Wachtell Lipton Rosen & Katz  
51 West 52<sup>nd</sup> Street  
New York, New York 10019  
Facsimile: (212) 403-2000  
Attention: James Cole Jr.

If to the Trustee:

Wells Fargo Bank, National Association  
230 W. Monroe Street, Suite 2900  
Chicago, IL 60606  
Facsimile: (312) 726-2158  
Attention: Corporate Trust Services

All notices and communications shall be deemed to have been duly given: at the time delivered by hand, if personally delivered; five Business Days after being deposited in the mail, postage prepaid, if mailed; when receipt acknowledged, if telecopied; at the time delivered, if delivered electronically; and the next Business Day after timely delivery to the courier, if sent by overnight air courier guaranteeing next day delivery. If a notice or communication is mailed in the manner provided above within the time prescribed, it is duly given, whether or not the addressee receives it. Any notice or communication to a Holder may be mailed or electronically delivered.

The Issuer, the Guarantors or the Trustee by written notice to the others may designate additional or different addresses for subsequent notices or communications.

In case by reason of the suspension of regular mail service, or by reason of any other cause, it shall be impossible to mail any notice or communication as required by this Indenture, then such method of notification as shall be made with the approval of the Trustee shall constitute a sufficient mailing of such notice.

SECTION 12.03. Communications by Holders with Other Holders.

Holders may communicate pursuant to TIA § 312(b) with other Holders with respect to their rights under this Indenture or the Notes. The Issuer, the Guarantors, the Trustee, the Registrar and anyone else shall have the protection of TIA § 312(c).

SECTION 12.04. Certificate and Opinion as to Conditions Precedent.

Upon any request or application by the Issuer to the Trustee to take any action or refrain from taking any action under this Indenture, upon request of the Trustee, the Issuer shall furnish to the Trustee:

(1) an Officer's Certificate in form and substance reasonably satisfactory to the Trustee (which shall include the statements set forth in Section 12.05) stating that, in the opinion of the signer, all conditions precedent, if any, provided for in this Indenture relating to the proposed action have been complied with; and

(2) an Opinion of Counsel in form and substance reasonably satisfactory to the Trustee (which shall include the statements set forth in Section 12.05) stating that, in the opinion of such counsel, all such conditions precedent, if any, provided for in this Indenture relating to the proposed action have been complied with.

SECTION 12.05. Statements Required in Certificate and Opinion.

Each certificate and opinion with respect to compliance by or on behalf of the Issuer or any Guarantor with a condition or covenant provided for in this Indenture shall include:

- (1) a statement that each individual making such certificate or opinion has read such condition or covenant;
- (2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;
- (3) a statement that, in the opinion of each such individual, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such condition or covenant has been complied with; and
- (4) a statement as to whether or not, in the opinion of each such individual, such condition or covenant has been complied with;

*provided* that, with respect to matters of fact, legal counsel delivering such Opinion of Counsel may rely on an Officer's Certificate or certificates of public officials.

SECTION 12.06. Rules by Trustee and Agents.

The Trustee may make reasonable rules for action by or meetings of Holders. The Registrar and Paying Agent may make reasonable rules for their functions.

SECTION 12.07. Business Days; Legal Holidays.

A "Business Day" is a day that is not a Legal Holiday. A "Legal Holiday" is a Saturday, a Sunday or other day on which (i) the Trustee or commercial banks in the City of New York are authorized or required by law to close or (ii) the New York Stock Exchange is not open for trading. If a payment date is a Legal Holiday, payment may be made at that place on the next succeeding day that is not a Legal Holiday with the same force and effect as if made on such payment date, and no interest shall accrue for the intervening period.

SECTION 12.08. Governing Law.

THIS INDENTURE, THE GUARANTEES AND THE NOTES SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, BUT WITHOUT GIVING EFFECT TO APPLICABLE PRINCIPLES OF CONFLICTS OF LAW TO THE EXTENT THAT THE APPLICATION OF THE LAW OF ANOTHER JURISDICTION

WOULD BE REQUIRED THEREBY. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF ANY NEW YORK STATE COURT SITTING IN THE BOROUGH OF MANHATTAN IN THE CITY OF NEW YORK OR ANY FEDERAL COURT SITTING IN THE BOROUGH OF MANHATTAN IN THE CITY OF NEW YORK IN RESPECT OF ANY SUIT, ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS INDENTURE, THE GUARANTEES AND THE NOTES, AND IRREVOCABLY ACCEPTS FOR ITSELF AND IN RESPECT OF ITS PROPERTY, GENERALLY AND UNCONDITIONALLY, EXCLUSIVE JURISDICTION OF THE AFORESAID COURTS. EACH OF THE PARTIES HERETO IRREVOCABLY WAIVES, TO THE FULLEST EXTENT THAT IT MAY EFFECTIVELY DO SO UNDER APPLICABLE LAW, TRIAL BY JURY AND ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF THE VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING BROUGHT IN ANY SUCH COURT AND ANY CLAIM THAT ANY SUCH SUIT, ACTION OR PROCEEDING BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM. NOTHING HEREIN SHALL AFFECT THE RIGHT OF ANY PARTY HERETO TO SERVE PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR TO COMMENCE LEGAL PROCEEDINGS OR OTHERWISE PROCEED AGAINST ANY OTHER PARTY HERETO IN ANY OTHER JURISDICTION. CERTAIN MORTGAGES AND OTHER SECURITY DOCUMENTS WILL BE GOVERNED BY THE LAWS OF OTHER STATES.

SECTION 12.09. No Adverse Interpretation of Other Agreements.

This Indenture may not be used to interpret another indenture, loan, security or debt agreement of the Issuer or any Subsidiary thereof. No such indenture, loan, security or debt agreement may be used to interpret this Indenture.

SECTION 12.10. Successors.

All agreements of the Issuer and the Guarantors in this Indenture and the Notes shall bind their respective successors. All agreements of the Trustee, any additional trustee and any Paying Agents in this Indenture shall bind their respective successors.

SECTION 12.11. Multiple Counterparts.

The parties may sign multiple counterparts of this Indenture. Each signed counterpart shall be deemed an original, but all of them together represent one and the same agreement.

SECTION 12.12. Table of Contents, Headings, Etc.

The table of contents, cross-reference sheet and headings of the Articles and Sections of this Indenture have been inserted for convenience of reference only, are not to be considered a part hereof, and shall in no way modify or restrict any of the terms or provisions hereof.

SECTION 12.13. Separability.

Each provision of this Indenture shall be considered separable and if for any reason any provision which is not essential to the effectuation of the basic purpose of this Indenture or the Notes shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

SECTION 12.14. Waiver of Jury Trial.

EACH OF THE ISSUER, GUARANTORS AND THE TRUSTEE HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS INDENTURE, THE NOTES, THE GUARANTEES OR THE TRANSACTIONS CONTEMPLATED HEREBY.

SECTION 12.15. Force Majeure.

In no event shall the Trustee be responsible or liable for any failure or delay in the performance of its obligations hereunder arising out of or caused by, directly or indirectly, forces beyond its control, including, without limitation, strikes, work stoppages, accidents, acts of war or terrorism, civil or military disturbances, nuclear or natural catastrophes or acts of God, and interruptions, loss or malfunctions of utilities, communications or computer (software and hardware) services; it being understood that the Trustee shall use reasonable efforts which are consistent with accepted practices in the banking industry to resume performance as soon as practicable under the circumstances.

SECTION 12.16. Intercreditor Agreement.

This Indenture, the Notes, the Security Documents, the Trustee, the Collateral Agent and the Holders are subject to and bound by the terms of the Intercreditor Agreement.

*[Signature Pages Follow]*

IN WITNESS WHEREOF, the parties have caused this Indenture to be duly executed all  
as of the date and year first written above.

SEARS HQLDINGS CORPORATION, as Issuer

By: William K. Phelan  
Name: William K. Phelan  
Title: Senior Vice President, Controller and  
Chief Accounting Officer

KMART CORPORATION  
KMART HOLDING CORPORATION  
KMART MANAGEMENT CORPORATION  
SEARS HOLDINGS MANAGEMENT  
CORPORATION  
SEARS, ROEBUCK AND CO.,  
as Guarantors

By: William K. Phelan  
Name: William K. Phelan  
Title: Senior Vice President and Controller

CALIFORNIA BUILDER APPLIANCES, INC.  
FLORIDA BUILDER APPLIANCES, INC.  
KLC, INC.  
KMART OF MICHIGAN, INC.  
LANDS' END DIRECT MERCHANTS, INC.  
LANDS' END, INC.  
PRIVATE BRANDS, LTD.  
SEARS BRANDS MANAGEMENT  
CORPORATION  
SEARS HOME IMPROVEMENT PRODUCTS,  
INC.  
SEARS OUTLET STORES, L.L.C.  
SEARS PROTECTION COMPANY  
SEARS ROEBUCK ACCEPTANCE CORP.  
SEARS, ROEBUCK DE PUERTO RICO, INC.  
SOE, INC.  
STARWEST, LLC,  
as Guarantors

By: William K. Phelan  
Name: William K. Phelan  
Title: Vice President

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KMART.COM LLC, as Guarantor

By: Bluelight.com, Inc., its Member

By: William K. Phelan  
Name: William K. Phelan  
Title: Vice President

KMART OF WASHINGTON LLC  
KMART STORES OF ILLINOIS LLC  
KMART STORES OF TEXAS LLC  
MYGOFER LLC, as Guarantors

By: Kmart Corporation, its Member

By: William K. Phelan  
Name: William K. Phelan  
Title: Senior Vice President and Controller

SEARS PROTECTION COMPANY (FLORIDA),  
L.L.C., as Guarantor

By: Sears Protection Company, its Member

By: William K. Phelan  
Name: William K. Phelan  
Title: Vice President

A&E HOME DELIVERY, LLC  
A&E LAWN & GARDEN, LLC  
A&E SIGNATURE SERVICE, LLC  
SEARS AUTHORIZED HOMETOWN STORES,  
LLC  
SEARS HOME APPLIANCE SHOWROOMS,  
LLC, as Guarantors

By: Sears, Roebuck and Co., its Member

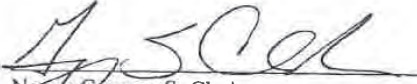
By: William K. Phelan  
Name: William K. Phelan  
Title: Senior Vice President and Controller

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WELLS FARGO BANK, NATIONAL ASSOCIATION,  
as Trustee and Collateral Agent

By:



Name: Gregory S. Clarke

Title: Vice President

Signature Page to Indenture

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SCHEDULE A

LIST OF GUARANTORS

A&E Home Delivery, LLC  
A&E Lawn & Garden, LLC  
A&E Signature Service, LLC  
California Builder Appliances, Inc.  
Florida Builder Appliances, Inc.  
KLC, Inc.  
Kmart Corporation  
Kmart Holding Corporation  
Kmart Management Corporation  
Kmart of Michigan, Inc.  
Kmart of Washington LLC  
Kmart Stores of Illinois LLC  
Kmart Stores of Texas LLC  
Kmart.com LLC  
Lands' End Direct Merchants, Inc.  
Lands' End, Inc.  
MyGofer LLC  
Private Brands, Ltd.  
Sears Authorized Hometown Stores, LLC  
Sears Brands Management Corporation  
Sears Holdings Management Corporation  
Sears Home Appliance Showrooms, LLC  
Sears Home Improvement Products, Inc.  
Sears Outlet Stores, L.L.C.  
Sears Protection Company  
Sears Protection Company (Florida), L.L.C.  
Sears Roebuck Acceptance Corp.  
Sears, Roebuck and Co.  
Sears, Roebuck de Puerto Rico, Inc.  
SOE, Inc.  
StarWest, LLC

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EXHIBIT A

CUSIP:  
ISIN:

No.

SEARS HOLDINGS CORPORATION

\$[ ]

6 $\frac{5}{8}$ % SENIOR SECURED NOTES DUE 2018

SEARS HOLDINGS CORPORATION, a Delaware corporation, promises to pay to \_\_\_\_\_, or registered assigns, the principal sum of \_\_\_\_\_ Dollars [(subject to adjustment as reflected in the Schedule of Increases or Decreases in Global Note attached hereto)]<sup>1</sup> on October 15, 2018.

Interest Payment Dates: April 15 and October 15.

Record Dates: April 1 and October 1.

Reference is made to the further provisions of this Note contained herein, which will for all purposes have the same effect as if set forth at this place.

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<sup>1</sup> Use Schedule of Increases or Decreases if Global Note.

IN WITNESS WHEREOF, the Issuer has caused this Note to be signed manually or by  
facsimile by its duly authorized officer.

SEARS HOLDINGS CORPORATION

By: \_\_\_\_\_  
Name:  
Title:



Certificate of Authentication

This is one of the Notes referred to in the within-mentioned Indenture.

Dated:

WELLS FARGO BANK, NATIONAL ASSOCIATION,  
as Trustee

By: \_\_\_\_\_  
Authorized Signatory

[FORM OF REVERSE OF NOTE]

SEARS HOLDINGS CORPORATION

6½% SENIOR SECURED NOTES DUE 2018

1 Interest. Sears Holdings Corporation (the “Issuer”), a Delaware corporation, promises to pay, until the principal hereof is paid or made available for payment, interest on the principal amount set forth on the face hereof at a rate of 6½% per annum. Interest hereon will accrue from and including the most recent date to which interest has been paid or, if no interest has been paid, from and including October 12, 2010 to but excluding the date on which interest is paid. Interest shall be payable in arrears on each April 15 and October 15, commencing on April 15, 2011. Interest will be computed on the basis of a 360-day year of twelve 30-day months. The Issuer shall pay interest on overdue principal and on overdue interest (to the full extent permitted by law) at a rate equal to the interest rate on the Notes.

2 Method of Payment. The Issuer will pay interest hereon (except defaulted interest) to the Persons who are registered Holders at the close of business on April 1 or October 1 next preceding the Interest Payment Date; provided that if an Interest Payment Date falls on a Legal Holiday, interest will be payable on the next succeeding day that is not a Legal Holiday with the same force and effect as if made on such Interest Payment Date, and no interest shall accrue for the intervening period. Holders must surrender Notes to a Paying Agent to collect principal payments. The Issuer will pay principal and interest in money of the United States of America that at the time of payment is legal tender for payment of public and private debts. At the option of the Issuer, each installment of interest may be paid by (i) check mailed to addresses of the Persons entitled thereto as such addresses shall appear on the registry maintained by the Registrar or (ii) wire transfer to an account located in the United States maintained by the payee. Payments in respect of Notes represented by a Global Note (including principal, premium, if any, and interest) will be made by wire transfer of immediately available funds to the accounts specified by the Depository.

3 Paying Agent and Registrar. Initially, Wells Fargo Bank, National Association (the “Trustee”) will act as a Paying Agent and Registrar. The Issuer may appoint and change any Paying Agent or Registrar or co-registrar without notice. The Issuer or any of its Affiliates may act as Paying Agent or Registrar.

4 Indenture. The Issuer issued the Notes under an Indenture dated as of October 12, 2010 (the “Indenture”) among the Issuer, the Guarantors (as defined in the Indenture) and the Trustee. This is one of an issue of Notes of the Issuer issued, or to be issued, under the Indenture. The terms of the Notes include those stated in the Indenture and those made part of the Indenture by reference to the Trust Indenture Act of 1939, as amended (15 U.S. Code §§ 77aaa-77bbb), as amended from time to time. The Notes are subject to all such terms, and Holders are referred to the Indenture and such Act for a statement of them. Capitalized and certain other terms used herein and not otherwise defined have the meanings set forth in the Indenture.

5. Optional Redemption.

(a) The Notes may be redeemed in whole or in part, at the Issuer’s option, at any time and from time to time at a redemption price equal to the greater of (1) 100% of the principal amount of the Notes to be redeemed and (2) the sum of the present values of the remaining scheduled payments of principal and interest thereon discounted to the Redemption Date at the Treasury Rate, plus 50 basis points, plus accrued interest thereon to the Redemption Date.

(b) In the event of a redemption of fewer than all of the Notes, if the Notes are Global Notes selection for redemption shall be made in accordance with Applicable Procedures, otherwise the Trustee shall select the Notes to be redeemed in compliance with Section 3.02 of the Indenture.

6. Notice of Redemption. Notice of redemption will be mailed at least 30 days but not more than 60 days before the Redemption Date to each Holder of Notes to be redeemed at his registered address, except that redemption notice may be mailed more than 60 days prior to a Redemption Date if the notice is issued in connection with a defeasance of the Notes or a satisfaction or discharge of the Indenture. On and after the Redemption Date, unless the Issuer defaults in making the redemption payment, interest ceases to accrue on Notes or portions thereof called for redemption.

7. Offers to Purchase upon a Change of Control Triggering Event. The Indenture provides that upon the occurrence of a Change of Control Triggering Event and subject to further limitations contained therein, the Issuer shall make an offer to purchase outstanding Notes in accordance with the procedures set forth in Section 4.07 of the Indenture.

8. Offers to Purchase upon a Collateral Coverage Event. The Indenture provides that upon the occurrence of a Collateral Coverage Event and subject to further limitations contained therein, the Issuer shall make an offer to purchase outstanding Notes in accordance with the procedures set forth in Section 4.08 of the Indenture.

9. Registration Rights. Pursuant to the Registration Rights Agreements, the Issuer will be obligated, under certain circumstances, to consummate an exchange offer pursuant to which the Holder of this Note shall have the right to exchange this Note for notes which have been registered under the Securities Act, in like principal amount and having substantially identical terms as the Notes. The Holders shall be entitled to receive certain additional interest payments in the event such exchange offer is not consummated and upon certain other conditions, all pursuant to and in accordance with the terms of the applicable Registration Rights Agreement.

10. Denominations, Transfer, Exchange. The Notes are in registered form without coupons in denominations of \$2,000 and integral multiples of \$1,000 in excess thereof. A Holder may transfer or exchange Notes in accordance with the Indenture. The Registrar may require a Holder, among other things, to furnish appropriate endorsements and transfer documents and to pay to it any taxes and fees required by law or permitted by the Indenture.

11. Persons Deemed Owners. The registered Holder of this Note may be treated as the owner of this Note for all purposes.

12. Unclaimed Money. If money for the payment of principal or interest remains unclaimed for two years, the Trustee will pay the money back to the Issuer at its written request. After that, Holders entitled to the money must look to the Issuer for payment as general unsecured creditors unless an "abandoned property" law designates another Person.

13. Amendment, Supplement, Waiver, Etc. The Issuer, the Guarantors and the Trustee (or the Collateral Agent, if a party thereto) may, without the consent of the Holders of any outstanding Notes, amend, waive or supplement the Indenture, the Notes or the Security Documents for certain specified purposes set forth in the Indenture, including, among other things, curing ambiguities, defects or inconsistencies, complying with the requirements of the Commission in order to maintain or effect the qualification of the Indenture under the Trust Indenture Act of 1939, as amended, and making any change that does not adversely affect the legal rights under the Indenture of any Holder. Other amendments and modifications of the Indenture, the Notes or the Security Documents may be made by the Issuer, and the

Trustee or the Collateral Agent, if a party thereto) with the consent of the Holders of not less than a majority of the aggregate principal amount of the outstanding Notes, subject to certain exceptions set forth in the Indenture requiring the consent of the Holders of the particular Notes to be affected.

14. Successor Corporation. When a successor Person assumes all the obligations of its predecessor under the Notes and the Indenture and the transaction complies with the terms of Article Five of the Indenture, the predecessor corporation will, except as provided in Article Five, be released from those obligations.

15. Defaults and Remedies. Events of Default are set forth in the Indenture. Subject to certain limitations in the Indenture, if an Event of Default (other than an Event of Default specified in clause (4) or (5) of Section 6.01 of the Indenture) occurs and is continuing, the Trustee or the Holders of not less than 25% in aggregate principal amount of the outstanding Notes may, by written notice to the Trustee and the Issuer, declare all principal of and accrued interest on all Notes to be immediately due and payable and such amounts shall become immediately due and payable. If an Event of Default specified in clause (4) or (5) of Section 6.01 of the Indenture occurs, the principal amount of and interest on, all Notes shall ipso facto become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holder. Holders may not enforce the Indenture or the Notes except as provided in the Indenture. The Trustee may require security or indemnity satisfactory to it before it enforces the Indenture or the Notes. Subject to certain limitations, Holders of a majority in principal amount of the then outstanding Notes may direct the Trustee in its exercise of any trust or power. The Trustee may withhold from Holders notice of any continuing default (except a default in payment of principal, premium, if any, or interest on the Notes when and as the same shall become due and payable) if the executive committee or a trust committee of directors or Responsible Officers of the Trustee in good faith determines that the withholding of such notice is in the interests of the Holders of the Notes.

16. Trustee Dealings with Issuer. The Trustee, in its individual or any other capacity, may make loans to, accept deposits from, and perform services for the Issuer or its Affiliates, and may otherwise deal with the Issuer or its Affiliates, as if it were not Trustee.

17. Discharge. The Issuer's and the Guarantors' obligations pursuant to the Indenture will be discharged, except for obligations pursuant to certain sections thereof, subject to the terms of the Indenture, upon the payment of all the Notes or upon the irrevocable deposit with the Trustee of United States Dollars or Government Securities sufficient to pay when due principal of and interest on the Notes to maturity or redemption, as the case may be.

18. Guarantees. The Notes will be entitled to the benefits of certain Guarantees made for the benefit of the Holders. Reference is hereby made to the Indenture for a statement of the respective rights, limitations of rights, duties and obligations thereunder of the Guarantors, the Trustee and the Holders.

19. Security Documents and Intercreditor Agreement. The obligations of the Issuer and the Guarantors under the Indenture, the Notes and the Guarantees are secured by a Lien on the Collateral pursuant to the Security Documents. The provisions of the Indenture, the Notes and the Security Documents are subject to the Intercreditor Agreement.

20. Authentication. This Note shall not be valid until the Trustee signs the certificate of authentication on the other side of this Note.

21. Governing Law. This Note shall be governed by and construed in accordance with the laws of the State of New York, but without giving effect to applicable principles of conflicts of

law to the extent that the application of the law of another jurisdiction would be required thereby. Each of the Trustee, the Issuer, the Guarantors and the Holders hereby irrevocably submits to the exclusive jurisdiction of any New York State court sitting in the Borough of Manhattan in the City of New York or any federal court sitting in the Borough of Manhattan in the City of New York in respect of any suit, action or proceeding arising out of or relating to the Indenture and this Note, and irrevocably accepts for itself and in respect of its property, generally and unconditionally, exclusive jurisdiction of the aforesaid courts.

22. Abbreviations. Customary abbreviations may be used in the name of a Holder or an assignee, such as: TEN COM (= tenants in common), TENANT (= tenants by the entireties), JT TEN (= joint tenants with right of survivorship and not as tenants in common), CUST (= Custodian), and U/G/M/A (= Uniform Gifts to Minors Act).

The Issuer will furnish to any Holder upon written request and without charge a copy of the Indenture. Requests may be made to:

Sears Holdings Corporation  
3333 Beverly Road  
Hoffman Estates, Illinois 60179  
Facsimile: (847) 286-2055  
Attention: Treasurer



ASSIGNMENT

I or we assign and transfer this Note to:

\_\_\_\_\_  
(Insert assignee's social security or tax I.D. number)

\_\_\_\_\_  
\_\_\_\_\_  
(Print or type name, address and zip code of assignee)

and irrevocably appoint: \_\_\_\_\_

Agent to transfer this Note on the books of the Issuer. The Agent may substitute another to act for him.

Date: \_\_\_\_\_ Your Signature: \_\_\_\_\_  
(Sign exactly as your name appears on  
the other side of this Note)

Signature Guarantee: \_\_\_\_\_

SIGNATURE GUARANTEE

Signatures must be guaranteed by an "eligible guarantor institution" meeting the requirements of the Registrar, which requirements include membership or participation in the Security Transfer Agent Medallion Program ("STAMP") or such other "signature guarantee program" as may be determined by the Registrar in addition to, or in substitution for, STAMP, all in accordance with the Securities Exchange Act of 1934, as amended.

[TO BE ATTACHED TO GLOBAL NOTES]

SCHEDULE OF INCREASES OR DECREASES IN GLOBAL NOTE

The initial principal amount of this Global Note is \$\_\_\_\_\_. The following increases or decreases in this Global Note have been made:

Date	Amount of decrease in principal amount of this Global Note	Amount of increase in principal amount of this Global Note	Principal amount of this Global Note following such decrease or increase	Signature of authorized signatory of Trustee or Depository Custodian
------	--	--	--	--

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OPTION OF HOLDER TO ELECT PURCHASE

If you want to elect to have this Note purchased by the Issuer pursuant to Section 4.07 or Section 4.08 of the Indenture, check the appropriate box:

Section 4.07 [ ☐ ]      Section 4.08 [ ☐ ]

If you want to elect to have only part of this Note purchased by the Issuer pursuant to Section 4.07 or Section 4.08 of the Indenture, state the amount: \$ \_\_\_\_\_

Date: \_\_\_\_\_

Your Signature: \_\_\_\_\_

(Sign exactly as your name appears on  
the other side of this Note)

\_\_\_\_\_  
Signature Guaranteed

SIGNATURE GUARANTEE

Signatures must be guaranteed by an “eligible guarantor institution” meeting the requirements of the Registrar, which requirements include membership or participation in the Security Transfer Agent Medallion Program (“STAMP”) or such other “signature guarantee program” as may be determined by the Registrar in addition to, or in substitution for, STAMP, all in accordance with the Securities Exchange Act of 1934, as amended.

EXHIBIT B

[FORM OF LEGEND FOR 144A NOTES AND OTHER NOTES  
THAT ARE RESTRICTED NOTES]

THE SECURITY (OR ITS PREDECESSOR) EVIDENCED HEREBY WAS ORIGINALLY ISSUED IN A TRANSACTION EXEMPT FROM REGISTRATION UNDER SECTION 5 OF THE UNITED STATES SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND THE SECURITY EVIDENCED HEREBY MAY NOT BE OFFERED, SOLD OR OTHERWISE TRANSFERRED IN THE ABSENCE OF SUCH REGISTRATION OR AN APPLICABLE EXEMPTION THEREFROM. EACH PURCHASER OF THE SECURITY EVIDENCED HEREBY IS HEREBY NOTIFIED THAT THE SELLER MAY BE RELYING ON THE EXEMPTION FROM THE PROVISIONS OF SECTION 5 OF THE SECURITIES ACT PROVIDED BY RULE 144A THEREUNDER. THE HOLDER OF THE SECURITY EVIDENCED HEREBY AGREES FOR THE BENEFIT OF THE ISSUER THAT (A) SUCH SECURITY MAY BE RESOLD, PLEDGED OR OTHERWISE TRANSFERRED, ONLY (1)(a) INSIDE THE UNITED STATES TO A PERSON WHO THE SELLER REASONABLY BELIEVES IS A QUALIFIED INSTITUTIONAL BUYER (AS DEFINED IN RULE 144A UNDER THE SECURITIES ACT) PURCHASING FOR ITS OWN ACCOUNT OR FOR THE ACCOUNT OF A QUALIFIED INSTITUTIONAL BUYER IN A TRANSACTION MEETING THE REQUIREMENTS OF RULE 144A UNDER THE SECURITIES ACT, (b) OUTSIDE THE UNITED STATES TO A FOREIGN PERSON IN A TRANSACTION MEETING THE REQUIREMENTS OF RULE 903 OR RULE 904 OF REGULATION S UNDER THE SECURITIES ACT, (c) PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT PROVIDED BY RULE 144 THEREUNDER (IF APPLICABLE) OR (d) IN ACCORDANCE WITH ANOTHER EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT (AND BASED UPON AN OPINION OF COUNSEL ACCEPTABLE TO THE ISSUER IF THE ISSUER SO REQUESTS), (2) TO THE ISSUER OR (3) PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT AND, IN EACH CASE, IN ACCORDANCE WITH ANY APPLICABLE SECURITIES LAWS OF ANY STATE OF THE UNITED STATES OR ANY OTHER APPLICABLE JURISDICTION AND (B) THE HOLDER WILL, AND EACH SUBSEQUENT HOLDER IS REQUIRED TO, NOTIFY ANY PURCHASER OF THE SECURITY EVIDENCED HEREBY OF THE RESALE RESTRICTIONS SET FORTH IN CLAUSE (A) ABOVE. NO REPRESENTATION CAN BE MADE AS TO THE AVAILABILITY OF THE EXEMPTION PROVIDED BY RULE 144 FOR RESALE OF THE SECURITY EVIDENCED HEREBY.

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[FORM OF ASSIGNMENT FOR 144A NOTES AND OTHER NOTES  
THAT ARE RESTRICTED NOTES]

I or we assign and transfer this Note to:

\_\_\_\_\_  
(Insert assignee's social security or tax I.D. number)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(Print or type name, address and zip code of assignee)

and irrevocably appoint: \_\_\_\_\_

Agent to transfer this Note on the books of the Issuer. The Agent may substitute another to act for him.

[Check One]

☐ (a) this Note is being transferred in compliance with the exemption from registration under the Securities Act provided by Rule 144A thereunder.

or

☐ (b) this Note is being transferred other than in accordance with (a) above and documents are being furnished which comply with the conditions of transfer set forth in this Note and the Indenture.

If none of the foregoing boxes is checked, the Trustee or Registrar shall not be obligated to register this Note in the name of any person other than the Holder hereof unless and until the conditions to any such transfer of registration set forth herein and in Sections 2.16 and 2.17 of the Indenture shall have been satisfied.

Date: \_\_\_\_\_

Your Signature: \_\_\_\_\_

(Sign exactly as your name appears on  
the other side of this Note)

Signature Guarantee: \_\_\_\_\_

SIGNATURE GUARANTEE

Signatures must be guaranteed by an "eligible guarantor institution" meeting the requirements of the Registrar, which requirements include membership or participation in the Security Transfer Agent Medallion Program ("STAMP") or such other "signature guarantee program" as may be determined by the Registrar in addition to, or in substitution for, STAMP, all in accordance with the Securities Exchange Act of 1934, as amended.



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TO BE COMPLETED BY PURCHASER IF (a) ABOVE IS CHECKED

The undersigned represents and warrants that it is purchasing this Note for its own account or an account with respect to which it exercises sole investment discretion and that it and any such account is a "qualified institutional buyer" within the meaning of Rule 144A under the Securities Act and is aware that the sale to it is being made in reliance on Rule 144A and acknowledges that it has received such information regarding the Issuer as the undersigned has requested pursuant to Rule 144A or has determined not to request such information and that it is aware that the transferor is relying upon the undersigned's foregoing representations in order to claim the exemption from registration provided by Rule 144A.

Date: \_\_\_\_\_

NOTICE: To be executed by an executive officer

EXHIBIT C

[FORM OF LEGEND FOR REGULATION S NOTE]

THE SECURITY (OR ITS PREDECESSOR) EVIDENCED HEREBY WAS ORIGINALLY ISSUED IN A TRANSACTION EXEMPT FROM REGISTRATION UNDER SECTION 5 OF THE UNITED STATES SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND THE SECURITY EVIDENCED HEREBY MAY NOT BE OFFERED, SOLD OR OTHERWISE TRANSFERRED IN THE ABSENCE OF SUCH REGISTRATION OR AN APPLICABLE EXEMPTION THEREFROM. EACH PURCHASER OF THE SECURITY EVIDENCED HEREBY IS HEREBY NOTIFIED THAT THE SELLER MAY BE RELYING ON THE EXEMPTION FROM THE PROVISIONS OF SECTION 5 OF THE SECURITIES ACT PROVIDED BY RULE 144A THEREUNDER. THE HOLDER OF THE SECURITY EVIDENCED HEREBY AGREES FOR THE BENEFIT OF THE ISSUER THAT (A) SUCH SECURITY MAY BE RESOLD, PLEDGED OR OTHERWISE TRANSFERRED, ONLY (1)(a) INSIDE THE UNITED STATES TO A PERSON WHO THE SELLER REASONABLY BELIEVES IS A QUALIFIED INSTITUTIONAL BUYER (AS DEFINED IN RULE 144A UNDER THE SECURITIES ACT) PURCHASING FOR ITS OWN ACCOUNT OR FOR THE ACCOUNT OF A QUALIFIED INSTITUTIONAL BUYER IN A TRANSACTION MEETING THE REQUIREMENTS OF RULE 144A UNDER THE SECURITIES ACT, (b) OUTSIDE THE UNITED STATES TO A FOREIGN PERSON IN A TRANSACTION MEETING THE REQUIREMENTS OF RULE 903 OR RULE 904 OF REGULATION S UNDER THE SECURITIES ACT, (c) PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT PROVIDED BY RULE 144 THEREUNDER (IF APPLICABLE) OR (d) IN ACCORDANCE WITH ANOTHER EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT (AND BASED UPON AN OPINION OF COUNSEL ACCEPTABLE TO THE ISSUER IF THE ISSUER SO REQUESTS), (2) TO THE ISSUER OR (3) PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT AND, IN EACH CASE, IN ACCORDANCE WITH ANY APPLICABLE SECURITIES LAWS OF ANY STATE OF THE UNITED STATES OR ANY OTHER APPLICABLE JURISDICTION AND (B) THE HOLDER WILL, AND EACH SUBSEQUENT HOLDER IS REQUIRED TO, NOTIFY ANY PURCHASER OF THE SECURITY EVIDENCED HEREBY OF THE RESALE RESTRICTIONS SET FORTH IN CLAUSE (A) ABOVE. NO REPRESENTATION CAN BE MADE AS TO THE AVAILABILITY OF THE EXEMPTION PROVIDED BY RULE 144 FOR RESALE OF THE SECURITY EVIDENCED HEREBY.

[FORM OF ASSIGNMENT FOR REGULATION S NOTE]

I or we assign and transfer this Note to:

\_\_\_\_\_  
(Insert assignee's social security or tax I.D. number)

\_\_\_\_\_  
(Print or type name, address and zip code of assignee)

and irrevocably appoint: \_\_\_\_\_

Agent to transfer this Note on the books of the Issuer. The Agent may substitute another to act for him.

[Check One]

☐ (a) this Note is being transferred in compliance with the exemption from registration under the Securities Act provided by Rule 144A thereunder.

or

☐ (b) this Note is being transferred other than in accordance with (a) above and documents are being furnished which comply with the conditions of transfer set forth in this Note and the Indenture.

If none of the foregoing boxes is checked, the Trustee or Registrar shall not be obligated to register this Note in the name of any person other than the Holder hereof unless and until the conditions to any such transfer of registration set forth herein and in Sections 2.16 and 2.17 of the Indenture shall have been satisfied.

Date: \_\_\_\_\_

Your Signature: \_\_\_\_\_

(Sign exactly as your name appears on the other side of this Note)

Signature Guarantee: \_\_\_\_\_

SIGNATURE GUARANTEE

Signatures must be guaranteed by an "eligible guarantor institution" meeting the requirements of the Registrar, which requirements include membership or participation in the Security Transfer Agent Medallion Program ("STAMP") or such other "signature guarantee program" as may be determined by the Registrar in addition to, or in substitution for, STAMP, all in accordance with the Securities Exchange Act of 1934, as amended.

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TO BE COMPLETED BY PURCHASER IF (a) ABOVE IS CHECKED

The undersigned represents and warrants that it is purchasing this Note for its own account or an account with respect to which it exercises sole investment discretion and that it and any such account is a "qualified institutional buyer" within the meaning of Rule 144A under the Securities Act and is aware that the sale to it is being made in reliance on Rule 144A and acknowledges that it has received such information regarding the Issuer as the undersigned has requested pursuant to Rule 144A or has determined not to request such information and that it is aware that the transferor is relying upon the undersigned's foregoing representations in order to claim the exemption from registration provided by Rule 144A.

Date: \_\_\_\_\_

\_\_\_\_\_  
NOTICE: To be executed by an executive officer

EXHIBIT D

[FORM OF LEGEND FOR GLOBAL NOTE]

Any Global Note authenticated and delivered hereunder shall bear a legend (which would be in addition to any other legends required in the case of a Restricted Note) in substantially the following form:

**THIS NOTE IS A GLOBAL NOTE WITHIN THE MEANING OF THE INDENTURE HEREINAFTER REFERRED TO AND IS REGISTERED IN THE NAME OF A DEPOSITARY OR A NOMINEE OF A DEPOSITARY. THIS NOTE IS NOT EXCHANGEABLE FOR NOTES REGISTERED IN THE NAME OF A PERSON OTHER THAN THE DEPOSITARY OR ITS NOMINEE EXCEPT IN THE LIMITED CIRCUMSTANCES DESCRIBED IN THE INDENTURE, AND NO TRANSFER OF THIS NOTE (OTHER THAN A TRANSFER OF THIS NOTE AS A WHOLE BY THE DEPOSITARY TO A NOMINEE OF THE DEPOSITARY OR BY A NOMINEE OF THE DEPOSITARY TO THE DEPOSITARY OR ANOTHER NOMINEE OF THE DEPOSITARY) MAY BE REGISTERED EXCEPT IN THE LIMITED CIRCUMSTANCES DESCRIBED IN THE INDENTURE.**

Unless this Certificate is presented by an authorized representative of The Depository Trust Company (a New York corporation) ("DTC") to the Issuer or its agent for registration of transfer, exchange, or payment, and any Certificate issued is registered in the name of Cede & Co. or in such other name as is requested by an authorized representative of DTC (and any payment is made to Cede & Co. or such other entity as is requested by an authorized representative of DTC), any transfer, pledge or other use hereof for value or otherwise by or to any person is wrongful inasmuch as the registered owner hereof, Cede & Co., has an interest herein.



EXHIBIT E

Form of Certificate To Be  
Delivered in Connection with  
Transfers to Non-QIB Accredited Investors

Wells Fargo Bank, National Association  
Attn: DAPS Reorg  
MAC N9303-121  
608 2<sup>nd</sup> Ave South  
Minneapolis, MN 55479

Ladies and Gentlemen:

In connection with our proposed purchase of 6½% Senior Secured Notes due 2018 (the "Notes") of Sears Holdings Corporation, a Delaware corporation (the "Issuer"), we confirm that:

1. We understand that any subsequent transfer of the Notes is subject to certain restrictions and conditions set forth in the Indenture dated as of October 12, 2010 relating to the Notes and we agree to be bound by, and not to resell, pledge or otherwise transfer the Notes except in compliance with, such restrictions and conditions and the Securities Act of 1933, as amended (the "Securities Act").

2. We understand that the Notes have not been registered under the Securities Act or any other applicable securities laws, have not been and will not be qualified for sale under the securities laws of any non-U.S. jurisdiction and that the Notes may not be offered, sold, pledged or otherwise transferred except as permitted in the following sentence. We agree, on our own behalf and on behalf of any accounts for which we are acting as hereinafter stated, that if we should sell any Notes, we will do so only (i) to the Issuer or any subsidiary thereof, (ii) in accordance with Rule 144A under the Securities Act to a "qualified institutional buyer" (as defined in Rule 144A), (iii) to an institutional "accredited investor" (as defined below) that, prior to such transfer, furnishes (or has furnished on its behalf by a U.S. broker-dealer) to you a signed letter containing certain representations and agreements relating to the restrictions on transfer of the Notes, (iv) outside the United States to persons other than U.S. persons in offshore transactions meeting the requirements of Rule 904 of Regulation S under the Securities Act, (v) pursuant to the exemption from registration provided by Rule 144 under the Securities Act (if applicable) or (vi) pursuant to an effective registration statement, and we further agree to provide to any person purchasing any of the Notes from us a notice advising such purchaser that resales of the Notes are restricted as stated herein.

3. We understand that, on any proposed resale of any Notes, we will be required to furnish to you and the Issuer such certifications, legal opinions and other information as you and the Issuer may reasonably require to confirm that the proposed sale complies with the foregoing restrictions. We further understand that the Notes purchased by us will bear a legend to the foregoing effect.

4. We are an institutional "accredited investor" (as defined in Rule 501(a)(1), (2), (3) or (7) under the Securities Act) and have such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of our investment in the

Notes, and we and any accounts for which we are acting each are able to bear the economic risk of our or their investment, as the case may be.

5. We are acquiring the Notes purchased by us for our account or for one or more accounts (each of which is an institutional "accredited investor") as to each of which we exercise sole investment discretion.

6. We are not acquiring the Notes with a view toward the distribution thereof in a transaction that would violate the Securities Act or the securities laws of any state of the United States or any other applicable jurisdiction.

You are entitled to rely upon this letter and are irrevocably authorized to produce this letter or a copy hereof to any interested party in any administrative or legal proceeding or official inquiry with respect to the matters covered hereby.

Very truly yours,

[Name of Purchaser]

By: \_\_\_\_\_  
Name:  
Title:

Dated: \_\_\_\_\_

EXHIBIT F

Form of Certificate To Be Delivered  
in Connection with Transfers  
Pursuant to Regulation S

Wells Fargo Bank, National Association  
Attn: DAPS Reorg  
MAC N9303-121  
608 2<sup>nd</sup> Ave South  
Minneapolis, MN 55479

Re: Sears Holdings Corporation (the "Issuer")  
6<sup>5</sup>% Senior Secured Notes due 2018 (the "Notes")

Dear Sirs:

In connection with our proposed sale of \$ \_\_\_\_\_ aggregate principal amount of the Notes, we confirm that such sale has been effected pursuant to and in accordance with Regulation S under the U.S. Securities Act of 1933, as amended (the "Securities Act"), and, accordingly, we represent that:

(1) the offer of the Notes was not made to a U.S. person or to a person in the United States;

(2) either (a) at the time the buy offer was originated, the transferee was outside the United States or we and any person acting on our behalf reasonably believed that the transferee was outside the United States, or (b) the transaction was executed in, on or through the facilities of a designated off-shore securities market and neither we nor any person acting on our behalf knows that the transaction has been pre-arranged with a buyer in the United States;

(3) no directed selling efforts have been made in the United States in contravention of the requirements of Rule 904(a) of Regulation S;

(4) the transaction is not part of a plan or scheme to evade the registration requirements of the Securities Act; and

(5) we have advised the transferee of the transfer restrictions applicable to the Notes.

You are entitled to rely upon this letter and are irrevocably authorized to produce this letter or a copy hereof to any interested party in any administrative or legal proceedings or official inquiry with respect to the matters covered hereby. Terms used in this certificate have the meanings set forth in Regulation S.

Very truly yours,

[Name of Purchaser]

By: \_\_\_\_\_

EXHIBIT G

NOTATION OF GUARANTEE

For value received, each of the undersigned (the "Guarantors") has jointly and severally unconditionally guaranteed, to the extent set forth in the Indenture dated as of October 12, 2010 by and among Sears Holdings Corporation, the Guarantors party thereto and Wells Fargo Bank, National Association, as Trustee (as amended, restated or supplemented from time to time, the "Indenture"), and subject to the provisions of the Indenture, (a) the due and punctual payment of the principal of, and premium, if any, and interest on the Notes, when and as the same shall become due and payable, whether at maturity, by acceleration, required purchase or otherwise, the due and punctual payment of interest on overdue principal of, and premium and, to the extent permitted by law, interest, and the due and punctual performance of all other obligations of the Issuer to the Holders or the Trustee, all in accordance with the terms set forth in Article Ten of the Indenture, and (b) in case of any extension of time of payment or renewal of any Notes or any of such other obligations, that the same will be promptly paid in full when due or performed in accordance with the terms of the extension or renewal, whether at stated maturity, by acceleration, required purchase or otherwise, all in accordance with the terms set forth in Article Ten of the Indenture.

The obligations of the Guarantors to the Holders and to the Trustee pursuant to the Guarantees and the Indenture are expressly set forth in Article Ten of the Indenture, and reference is hereby made to the Indenture for the precise terms and limitations of the Guarantees. Each Holder of the Note to which this notation of Guarantee is endorsed, by accepting such Note, agrees to and shall be bound by such provisions.

*[Signature Pages Follow]*

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IN WITNESS WHEREOF, each of the Guarantors has caused this notation of Guarantee  
to be signed by a duly authorized officer.

[GUARANTORS]

By: \_\_\_\_\_

Name:

Title:



## **EXHIBIT B**

### FIRST SUPPLEMENTAL INDENTURE

This FIRST SUPPLEMENTAL INDENTURE, dated as of April 5, 2011 (this "Supplemental Indenture"), is entered into by and among Sears Holdings Corporation (the "Company"), the Guarantors (as defined in the Indenture), the New Guarantor (as defined below), and Wells Fargo Bank, National Association, as Trustee and Collateral Agent (the "Trustee").

### WITNESSETH

WHEREAS the Company and the existing Guarantors have heretofore executed and delivered to the Trustee an Indenture, dated as of October 12, 2010 (as amended, supplemented or otherwise modified in accordance with its terms, the "Indenture"), providing for the issuance of 6-5/8% Senior Secured Notes due 2018, in aggregate principal amount of \$1,250,000,000 (the "Notes");

WHEREAS Private Brands, Ltd. ("New Guarantor") is a company organized and incorporated under the laws of Delaware, and is a Specified Subsidiary;

WHEREAS Private Brands, Ltd., a West Virginia corporation and an existing guarantor of the Notes under the Indenture, shall merge with the New Guarantor (the "Merger") with the New Guarantor surviving the Merger;

WHEREAS Section 4.06 of the Indenture requires the New Guarantor to execute a supplemental indenture to unconditionally guarantee all of the Company's obligations under the Notes and the Indenture;

WHEREAS Section 8.01 of the Indenture provides that without the consent of any Holder of Notes, the Company, the Guarantors and the Trustee may amend or supplement the Indenture, the Notes or the Security Documents to add additional Guarantees of the Notes or additional assets as Collateral; and

WHEREAS the execution and delivery of this Supplemental Indenture has been authorized by the Board of Directors of the Company and of each Guarantor, the Company and the Guarantors have requested the Trustee join with them in the execution and delivery of this Supplemental Indenture, and in accordance with Section 4.06, Section 8.06 and Section 12.04 of the Indenture have delivered an Officer's Certificate and an Opinion of Counsel to the Trustee stating that the Supplemental Indenture is authorized or permitted by the Indenture and that all conditions precedent to its execution have been complied with.

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt of which is hereby acknowledged, the New Guarantor, the Company, the Guarantors and the Trustee mutually covenant and agree for the benefit of each other and the equal and ratable benefit of the Holders of the Notes as follows:

1. Defined Terms. Capitalized terms used but not defined herein shall have the meanings assigned thereto in the Indenture.

2. Agreement to Guarantee. The New Guarantor hereby agrees, jointly and severally with all existing Guarantors, to unconditionally guarantee the Company's obligations under the Notes on the terms and subject to the conditions set forth in Article Ten of the Indenture and to be bound by all other applicable provisions of the Indenture and the Notes and to perform all of the obligations and agreements of a Guarantor under the Indenture. The New Guarantor hereby agrees that a notation of such Guarantee, substantially in the form included in Exhibit A hereto, shall be endorsed on each Note authenticated and delivered by the Trustee and such notation of Guarantee shall be executed by either manual or facsimile signature of an Officer or an Officer of a general partner or member, as the case may be, of the New Guarantor.

3. Notices. All notices or other communications to the New Guarantor shall be given as provided in Section 12.02 of the Indenture.

4. Ratification of Indenture; Supplemental Indenture Part of Indenture. Except as expressly amended or supplemented hereby, the Indenture is in all respects ratified and confirmed and all the terms, conditions and provisions thereof shall remain in full force and effect. This Supplemental Indenture shall form a part of the Indenture for all purposes, and every Holder of Notes heretofore or hereafter authenticated and delivered shall be bound hereby.

5. Governing Law. **THIS SUPPLEMENTAL INDENTURE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK.**

6. Trustee Makes No Representation. The Trustee makes no representation as to the validity or sufficiency of this Supplemental Indenture or the Guarantee of the New Guarantor. The recitals contained herein shall be taken as the statements of the Company, the Guarantors and the New Guarantor, and the Trustee assumes no responsibility for their correctness. This Supplemental Indenture is executed and accepted by the Trustee subject to all the terms and conditions set forth in the Indenture with the same force and effect as if those terms and conditions were repeated at length herein and made applicable to the Trustee with respect hereto. In entering into this Supplemental Indenture, the Trustee shall be entitled to the benefit of every provision of the Indenture relating to the conduct or affecting the liability or affording protection to the Trustee, whether or not elsewhere herein so provided.

7. Counterparts. The parties may sign any number of copies of this Supplemental Indenture. Each signed copy shall be an original, but all of them together represent the same agreement.

8. Effect of Headings. The Section headings herein are for convenience only and shall not effect the construction thereof.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture to be duly executed, as of the day and year first written above.

SEARS HOLDINGS CORPORATION

By: William K. Phelan  
Name: William K. Phelan  
Title: Senior Vice President, Controller  
and Chief Accounting Officer

KMART CORPORATION  
KMART HOLDING CORPORATION  
KMART MANAGEMENT CORPORATION  
SEARS HOLDINGS MANAGEMENT  
CORPORATION  
SEARS, ROEBUCK AND CO.,  
as Guarantors

By: William K. Phelan  
Name: William K. Phelan  
Title: Senior Vice President and Controller

CALIFORNIA BUILDER APPLIANCES, INC.  
FLORIDA BUILDER APPLIANCES, INC.  
KLC, INC.  
LANDS' END DIRECT MERCHANTS, INC.  
LANDS' END, INC.  
SEARS BRANDS MANAGEMENT  
CORPORATION  
SEARS HOME IMPROVEMENT  
PRODUCTS, INC.  
SEARS PROTECTION COMPANY  
SEARS ROEBUCK ACCEPTANCE CORP.  
SEARS, ROEBUCK DE PUERTO RICO, INC.  
SOE, INC.  
STARWEST, LLC,  
as Guarantors

By: William K. Phelan  
Name: William K. Phelan  
Title: Vice President

*[Signature Page to Private Brands (Delaware) Supplemental Indenture]*

JX 132-107

KMART.COM LLC, as Guarantor

By: Bluelight.com, Inc., its Member

By: William K. Phelan

Name: William K. Phelan

Title: Vice President

KMART OF WASHINGTON LLC  
KMART STORES OF ILLINOIS LLC  
KMART STORES OF TEXAS LLC  
MYGOFER LLC, as Guarantors

By: Kmart Corporation, its Member

By: William K. Phelan

Name: William K. Phelan

Title: Senior Vice President and Controller

SEARS PROTECTION COMPANY  
(FLORIDA), L.L.C., as Guarantor

By: Sears Protection Company, its Member

By: William K. Phelan

Name: William K. Phelan

Title: Vice President

A&E HOME DELIVERY, LLC  
A&E LAWN & GARDEN, LLC  
A&E SIGNATURE SERVICE, LLC  
SEARS AUTHORIZED HOMETOWN  
STORES, LLC  
SEARS HOME APPLIANCE SHOWROOMS,  
LLC, as Guarantors

By: Sears, Roebuck and Co., its Member

By: William K. Phelan

Name: William K. Phelan

Title: Senior Vice President and Controller

*[Signature Page to Private Brands (Delaware) Supplemental Indenture]*

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18-23538-rdd Claim 64-1 Filed 02/20/19 Pg 109 of 213

KMART OF MICHIGAN, INC.  
SEARS OUTLET STORES, L.L.C.,  
as Guarantors

By: 

Name: Dorian R. Williams  
Title: Authorized Person

PRIVATE BRANDS, LTD.  
As New Guarantor

By: 

Name: Alfred H. Jasser  
Title: Treasurer

WELLS FARGO BANK, NATIONAL  
ASSOCIATION  
As Trustee and Collateral Agent

By: \_\_\_\_\_

Name: Gregory Clarke  
Title: Vice President

*[Signature Page to Private Brands (Delaware) Supplemental Indenture]*

JX 132-109


KMART OF MICHIGAN, INC.  
SEARS OUTLET STORES, L.L.C.,  
as Guarantors

By: \_\_\_\_\_  
Name: Dorian R. Williams  
Title: Authorized Person

PRIVATE BRANDS, LTD.  
As New Guarantor

By: \_\_\_\_\_  
Name:  
Title:

WELLS FARGO BANK, NATIONAL  
ASSOCIATION  
As Trustee and Collateral Agent

By:   
Name: Gregory Clarke  
Title: Vice President

*[Signature Page to Private Brands (Delaware) Supplemental Indenture]*

EXHIBIT A

NOTATION OF GUARANTEE

For value received, Private Brands, Ltd. (the "Guarantor") has jointly and severally unconditionally guaranteed, to the extent set forth in the Indenture dated as of October 12, 2010 by and among Sears Holdings Corporation, the Guarantors party thereto and Wells Fargo Bank, National Association, as Trustee (as amended, restated or supplemented from time to time, the "Indenture"), and subject to the provisions of the Indenture, (a) the due and punctual payment of the principal of, and premium, if any, and interest on the Notes, when and as the same shall become due and payable, whether at maturity, by acceleration, required purchase or otherwise; the due and punctual payment of interest on overdue principal of, and premium and, to the extent permitted by law, interest, and the due and punctual performance of all other obligations of the Issuer to the Holders or the Trustee, all in accordance with the terms set forth in Article Ten of the Indenture, and (b) in case of any extension of time of payment or renewal of any Notes or any of such other obligations, that the same will be promptly paid in full when due or performed in accordance with the terms of the extension or renewal, whether at stated maturity, by acceleration, required purchase or otherwise, all in accordance with the terms set forth in Article Ten of the Indenture.

The obligations of the Guarantor to the Holders and to the Trustee pursuant to the Guarantee and the Indenture are expressly set forth in Article Ten of the Indenture, and reference is hereby made to the Indenture for the precise terms and limitations of the Guarantees. Each Holder of the Note to which this notation of Guarantee is endorsed, by accepting such Note, agrees to and shall be bound by such provisions.

[Signature Pages Follow]



IN WITNESS WHEREOF, the Guarantor has caused this notation of Guarantee to  
be signed by a duly authorized officer.

PRIVATE BRANDS, LTD.

As Guarantor

By: 

Name: Alfred H. Jasser

Title: Treasurer

## EXHIBIT C



## SECOND SUPPLEMENTAL INDENTURE

This SECOND SUPPLEMENTAL INDENTURE, dated as of July 7, 2015 (this "Supplemental Indenture"), is entered into by and among Sears Holdings Corporation (the "Company"), the Guarantors (as defined in the Indenture), the New Guarantors (as defined below), and Wilmington Trust, National Association, as successor Trustee and Collateral Agent (the "Trustee").

### WITNESSETH

WHEREAS the Company and the existing Guarantors have heretofore executed and delivered to the Trustee an Indenture, dated as of October 12, 2010 (as amended, supplemented or otherwise modified in accordance with its terms, the "Indenture"), providing for the issuance of 6-5/8% Senior Secured Notes due 2018, in aggregate principal amount of \$1,250,000,000 (the "Notes");

WHEREAS each of Kmart Operations LLC and Sears Operations LLC (each a "New Guarantor") is a limited liability company organized under the laws of Delaware, and is a Specified Subsidiary;

WHEREAS Section 4.06 of the Indenture requires each New Guarantor to execute a supplemental indenture to unconditionally guarantee all of the Company's obligations under the Notes and the Indenture;

WHEREAS Section 8.01 of the Indenture provides that without the consent of any Holder of Notes, the Company, the Guarantors and the Trustee may amend or supplement the Indenture, the Notes or the Security Documents to add additional Guarantees of the Notes or additional assets as Collateral; and

WHEREAS the execution and delivery of this Supplemental Indenture has been authorized by the Board of Directors of the Company and of each Guarantor, the Company and the Guarantors have requested the Trustee join with them in the execution and delivery of this Supplemental Indenture, and in accordance with Section 4.06, Section 8.06 and Section 12.04 of the Indenture have delivered an Officer's Certificate and an Opinion of Counsel to the Trustee stating that the Supplemental Indenture is authorized or permitted by the Indenture and that all conditions precedent to its execution have been complied with.

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt of which is hereby acknowledged, each New Guarantor, the Company, the Guarantors and the Trustee mutually covenant and agree for the benefit of each other and the equal and ratable benefit of the Holders of the Notes as follows:

1. Defined Terms. Capitalized terms used but not defined herein shall have the meanings assigned thereto in the Indenture.

2. Agreement to Guarantee. Each New Guarantor hereby agrees, jointly and severally with all existing Guarantors, to unconditionally guarantee the Company's obligations under the Notes on the terms and subject to the conditions set forth in Article Ten of the

Indenture and to be bound by all other applicable provisions of the Indenture and the Notes and to perform all of the obligations and agreements of a Guarantor under the Indenture. Each New Guarantor hereby agrees that a notation of such Guarantee, substantially in the form included in Exhibit A hereto, shall be endorsed on each Note authenticated and delivered by the Trustee and such notation of Guarantee shall be executed by either manual or facsimile signature of an Officer or an Officer of a general partner or member, as the case may be, of the New Guarantor.

3. Notices. All notices or other communications to each New Guarantor shall be given as provided in Section 12.02 of the Indenture.

4. Ratification of Indenture; Supplemental Indenture Part of Indenture. Except as expressly amended or supplemented hereby, the Indenture is in all respects ratified and confirmed and all the terms, conditions and provisions thereof shall remain in full force and effect. This Supplemental Indenture shall form a part of the Indenture for all purposes, and every Holder of Notes heretofore or hereafter authenticated and delivered shall be bound hereby.

5. Governing Law. **THIS SUPPLEMENTAL INDENTURE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK.**

6. Trustee Makes No Representation. The Trustee makes no representation as to the validity or sufficiency of this Supplemental Indenture or the Guarantee of the New Guarantor. The recitals contained herein shall be taken as the statements of the Company, the Guarantors and each New Guarantor, and the Trustee assumes no responsibility for their correctness. This Supplemental Indenture is executed and accepted by the Trustee subject to all the terms and conditions set forth in the Indenture with the same force and effect as if those terms and conditions were repeated at length herein and made applicable to the Trustee with respect hereto. In entering into this Supplemental Indenture, the Trustee shall be entitled to the benefit of every provision of the Indenture relating to the conduct or affecting the liability or affording protection to the Trustee, whether or not elsewhere herein so provided.

7. Counterparts. The parties may sign any number of copies of this Supplemental Indenture. Each signed copy shall be an original, but all of them together represent the same agreement. The exchange of copies of this Supplemental Indenture and of signature pages by facsimile or PDF transmission shall constitute effective execution and delivery of this Supplemental Indenture as to the parties hereto and may be used in lieu of the original Indenture for all purposes. Signatures of the parties hereto transmitted by facsimile or PDF shall be deemed to be their original signatures for all purposes.

8. Effect of Headings. The Section headings herein are for convenience only and shall not effect the construction thereof.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture to be duly executed, as of the day and year first written above.

SEARS HOLDINGS CORPORATION

By: 

Name: Robert A. Schriesheim

Title: Executive Vice President and Chief  
Financial Officer

**NEW GUARANTORS:**

KMART OPERATIONS LLC  
SEARS OPERATIONS LLC

By: 

Name: Lawrence J. Meerschaert

Title: Vice President, Tax, Assistant  
Treasurer and Secretary

**GUARANTORS:**

A&E HOME DELIVERY, LLC  
A&E LAWN & GARDEN, LLC  
A&E SIGNATURE SERVICE, LLC  
CALIFORNIA BUILDER APPLIANCES, INC.  
FLORIDA BUILDER APPLIANCES, INC.  
KLC, INC.  
PRIVATE BRANDS, LTD.  
SEARS BRANDS MANAGEMENT  
CORPORATION  
SEARS HOME IMPROVEMENT PRODUCTS,  
INC.  
SEARS PROTECTION COMPANY  
SEARS PROTECTION COMPANY (FLORIDA),  
L.L.C.  
SEARS, ROEBUCK DE PUERTO RICO, INC.  
SOE, INC.  
STARWEST, LLC

By: 

Name: Lawrence J. Meerschaert

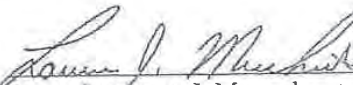
Title: Vice President

*[Signature Page to Kmart Operations LLC and Sears Operations LLC Supplemental Indenture]*


JX 132-116

KMART.COM LLC

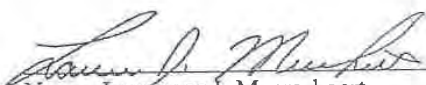
By: Bluelight.com, Inc., its Member

By:   
Name: Lawrence J. Meerschaert  
Title: Vice President

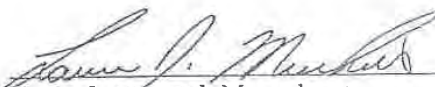
KMART CORPORATION

By:   
Name: Robert A. Riecker  
Title: Vice President, Controller and Chief  
Accounting Officer

KMART HOLDING CORPORATION  
KMART OF MICHIGAN, INC.  
SEARS, ROEBUCK AND CO.

By:   
Name: Lawrence J. Meerschaert  
Title: Vice President, Assistant Treasurer  
and Secretary

SEARS HOLDINGS MANAGEMENT  
CORPORATION

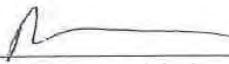
By:   
Name: Lawrence J. Meerschaert  
Title: Vice President, Tax and Assistant  
Treasurer

*[Signature Page to Kmart Operations LLC and Sears Operations LLC Supplemental Indenture]*


JX 132-117

KMART OF WASHINGTON LLC .  
KMART STORES OF ILLINOIS LLC  
KMART STORES OF TEXAS LLC  
MYGOFER LLC

By: Kmart Corporation, its Member

By:   
Name: Robert A. Riecker  
Title: Vice President, Controller and Chief  
Accounting Officer

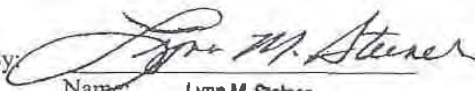
SEARS ROEBUCK ACCEPTANCE CORP.

By:   
Name: Karen M. Smathers  
Title: President

*[Signature Page to Kmart Operations LLC and Sears Operations LLC Supplemental Indenture]*



WILMINGTON TRUST, NATIONAL  
ASSOCIATION  
As Trustee and Collateral Agent

By: 

Name: Lynn M. Sisker  
Title: Vice President

*[Signature Page to Kmart Operations LLC and Sears Operations LLC Supplemental Indenture]*

EXHIBIT A

NOTATION OF GUARANTEE

For value received, Sears Operations LLC and Kmart Operations LLC (the "New Guarantors") have jointly and severally unconditionally guaranteed, to the extent set forth in the Indenture dated as of October 12, 2010 by and among Sears Holdings Corporation, the Guarantors party thereto and Wells Fargo Bank, National Association (subsequently replaced by Wilmington Trust, National Association), as Trustee (as amended, restated or supplemented from time to time, the "Indenture"), and subject to the provisions of the Indenture, (a) the due and punctual payment of the principal of, and premium, if any, and interest on the Notes, when and as the same shall become due and payable, whether at maturity, by acceleration, required purchase or otherwise, the due and punctual payment of interest on overdue principal of, and premium and, to the extent permitted by law, interest, and the due and punctual performance of all other obligations of the Issuer to the Holders or the Trustee, all in accordance with the terms set forth in Article Ten of the Indenture, and (b) in case of any extension of time of payment or renewal of any Notes or any of such other obligations, that the same will be promptly paid in full when due or performed in accordance with the terms of the extension or renewal, whether at stated maturity, by acceleration, required purchase or otherwise, all in accordance with the terms set forth in Article Ten of the Indenture.

The obligations of the New Guarantors to the Holders and to the Trustee pursuant to the Guarantee and the Indenture are expressly set forth in Article Ten of the Indenture, and reference is hereby made to the Indenture for the precise terms and limitations of the Guarantees. Each Holder of the Note to which this notation of Guarantee is endorsed, by accepting such Note, agrees to and shall be bound by such provisions.

[Signature Pages Follow]

IN WITNESS WHEREOF, the New Guarantors have caused this notation of  
Guarantee to be signed by a duly authorized officer.

KMART OPERATIONS LLC

By:

Name: Lawrence J. Meerschaert  
Title: Vice President, Tax, Assistant  
Treasurer and Secretary

SEARS OPERATIONS LLC

By:

Name: Lawrence J. Meerschaert  
Title: Vice President, Tax, Assistant  
Treasurer and Secretary

[Notation of Guarantee Signature Page]

JX 132-121

## **EXHIBIT D**

### THIRD SUPPLEMENTAL INDENTURE

This THIRD SUPPLEMENTAL INDENTURE, dated as of September 19, 2016 (this "Supplemental Indenture"), is entered into by and among Sears Holdings Corporation (the "Company"), the Guarantors (as defined in the Indenture), the New Guarantor (as defined below), and Wilmington Trust, National Association, as successor Trustee and Collateral Agent (the "Trustee").

#### W I T N E S S E T H

WHEREAS the Company and the existing Guarantors have heretofore executed and delivered to the Trustee an Indenture, dated as of October 12, 2010 (as amended, supplemented or otherwise modified in accordance with its terms, the "Indenture"), providing for the issuance of 6-5/8% Senior Secured Notes due 2018, in aggregate principal amount of \$1,250,000,000 (the "Notes");

WHEREAS A&E Factory Service, LLC (the "New Guarantor") is a limited liability company organized under the laws of Delaware, and is a Subsidiary;

WHEREAS Section 8.01 of the Indenture provides that without the consent of any Holder of Notes, the Company, the Guarantors and the Trustee may amend or supplement the Indenture, the Notes or the Security Documents to add additional Guarantees of the Notes or additional assets as Collateral; and

WHEREAS the Company has requested the Trustee join with it in the execution and delivery of this Supplemental Indenture, and in accordance with Section 8.06 and Section 12.04 of the Indenture have delivered an Officer's Certificate and an Opinion of Counsel to the Trustee stating that the Supplemental Indenture is authorized or permitted by the Indenture and that all conditions precedent to its execution have been complied with.

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt of which is hereby acknowledged, the New Guarantor, the Company, the Guarantors and the Trustee mutually covenant and agree for the benefit of each other and the equal and ratable benefit of the Holders of the Notes as follows:

1. Defined Terms. Capitalized terms used but not defined herein shall have the meanings assigned thereto in the Indenture.

2. Agreement to Guarantee. The New Guarantor hereby agrees, jointly and severally with all existing Guarantors, to unconditionally guarantee the Company's obligations under the Notes on the terms and subject to the conditions set forth in Article Ten of the Indenture and to be bound by all other applicable provisions of the Indenture and the Notes and to perform all of the obligations and agreements of a Guarantor under the Indenture. The New Guarantor hereby agrees that a notation of such Guarantee, substantially in the form included in Exhibit A hereto, shall be endorsed on each Note authenticated and delivered by the Trustee and such notation of Guarantee shall be executed by either manual or facsimile signature of an Officer or an Officer of a general partner or member, as the case may be, of the New Guarantor.



3. Notices. All notices or other communications to the New Guarantor shall be given as provided in Section 12.02 of the Indenture.

4. Ratification of Indenture; Supplemental Indenture Part of Indenture.  
Except as expressly amended or supplemented hereby, the Indenture is in all respects ratified and confirmed and all the terms, conditions and provisions thereof shall remain in full force and effect. This Supplemental Indenture shall form a part of the Indenture for all purposes, and every Holder of Notes heretofore or hereafter authenticated and delivered shall be bound hereby.

5. Governing Law. **THIS SUPPLEMENTAL INDENTURE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK.**

6. Trustee Makes No Representation. The Trustee makes no representation as to the validity or sufficiency of this Supplemental Indenture or the Guarantee of the New Guarantor. The recitals contained herein shall be taken as the statements of the Company, the Guarantors and the New Guarantor, and the Trustee assumes no responsibility for their correctness. This Supplemental Indenture is executed and accepted by the Trustee subject to all the terms and conditions set forth in the Indenture with the same force and effect as if those terms and conditions were repeated at length herein and made applicable to the Trustee with respect hereto. In entering into this Supplemental Indenture, the Trustee shall be entitled to the benefit of every provision of the Indenture relating to the conduct or affecting the liability or affording protection to the Trustee, whether or not elsewhere herein so provided.

7. Counterparts. The parties may sign any number of copies of this Supplemental Indenture. Each signed copy shall be an original, but all of them together represent the same agreement. The exchange of copies of this Supplemental Indenture and of signature pages by facsimile or PDF transmission shall constitute effective execution and delivery of this Supplemental Indenture as to the parties hereto and may be used in lieu of the original Indenture for all purposes. Signatures of the parties hereto transmitted by facsimile or PDF shall be deemed to be their original signatures for all purposes.

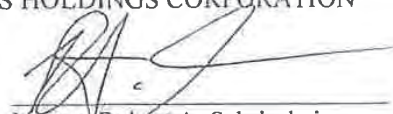
8. Effect of Headings. The Section headings herein are for convenience only and shall not effect the construction thereof.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture to be duly executed, as of the day and year first written above.

SEARS HOLDINGS CORPORATION

By:



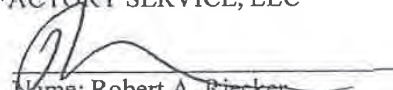
Name: Robert A. Schriesheim

Title: Executive Vice President and Chief  
Financial Officer

NEW GUARANTOR:

A&E FACTORY SERVICE, LLC

By:



Name: Robert A. Riecker

Title: Vice President

*[Signature Page to Third Supplemental Indenture]*

JX 132-125

WILMINGTON TRUST, NATIONAL  
ASSOCIATION  
As Trustee and Collateral Agent

By:   
Name: Lynn M. Steiner  
Title: Vice President

*[Signature Page to Third Supplemental Indenture]*

JX 132-126

EXHIBIT A

NOTATION OF GUARANTEE

For value received, A&E Factory Service, LLC (the "New Guarantor") has jointly and severally unconditionally guaranteed, to the extent set forth in the Indenture dated as of October 12, 2010 by and among Sears Holdings Corporation, the Guarantors party thereto and Wells Fargo Bank, National Association (subsequently replaced by Wilmington Trust, National Association), as Trustee (as amended, restated or supplemented from time to time, the "Indenture"), and subject to the provisions of the Indenture, (a) the due and punctual payment of the principal of, and premium, if any, and interest on the Notes, when and as the same shall become due and payable, whether at maturity, by acceleration, required purchase or otherwise, the due and punctual payment of interest on overdue principal of, and premium and, to the extent permitted by law, interest, and the due and punctual performance of all other obligations of the Issuer to the Holders or the Trustee, all in accordance with the terms set forth in Article Ten of the Indenture, and (b) in case of any extension of time of payment or renewal of any Notes or any of such other obligations, that the same will be promptly paid in full when due or performed in accordance with the terms of the extension or renewal, whether at stated maturity, by acceleration, required purchase or otherwise, all in accordance with the terms set forth in Article Ten of the Indenture.

The obligations of the New Guarantor to the Holders and to the Trustee pursuant to the Guarantee and the Indenture are expressly set forth in Article Ten of the Indenture, and reference is hereby made to the Indenture for the precise terms and limitations of the Guarantee. Each Holder of the Note to which this notation of Guarantee is endorsed, by accepting such Note, agrees to and shall be bound by such provisions.

[Signature Pages Follow]

IN WITNESS WHEREOF, the New Guarantor has caused this notation of  
Guarantee to be signed by a duly authorized officer.

A&E FACTORY SERVICE, LLC

By: \_\_\_\_\_

Name: Robert A. Riecker

Title: Vice President

*[Notation of Guarantee Signature Page]*



## **EXHIBIT E**



#### FOURTH SUPPLEMENTAL INDENTURE

This FOURTH SUPPLEMENTAL INDENTURE, dated as of January 9, 2018 (this "Supplemental Indenture"), is entered into by and among Sears Holdings Corporation (the "Company"), the Guarantors (as defined in the Indenture), and Wilmington Trust, National Association, as successor Trustee and Collateral Agent (the "Trustee").

#### W I T N E S S E T H

WHEREAS the Company and the Guarantors have heretofore executed and delivered to the Trustee an Indenture, dated as of October 12, 2010 (as amended, supplemented or otherwise modified in accordance with its terms, the "Indenture"), providing for the issuance of 6-5/8% Senior Secured Notes due 2018, in aggregate principal amount of \$1,250,000,000 (the "Notes");

WHEREAS Section 8.02(a) of the Indenture provides that with the consent of the Holders of at least a majority in aggregate principal amount of the outstanding Notes, other than notes held by the Company or affiliates of the Company (the "Requisite Consents"), the Company, the Guarantors and the Trustee may amend or supplement the Indenture, the Notes or the Security Documents, subject to certain exceptions;

WHEREAS the Requisite Consents for the adoption of the amendments to the Indenture set forth herein have been obtained, and this Supplemental Indenture complies with the requirements of Article 8 of the Indenture;

WHEREAS the execution and delivery of this Supplemental Indenture has been authorized by the Board of Directors of the Company, and the Company has requested the Trustee join with it in the execution and delivery of this Supplemental Indenture;

WHEREAS in accordance with Section 8.06 and Section 12.04 of the Indenture, the Company has delivered an Officer's Certificate and an Opinion of Counsel to the Trustee stating that the Supplemental Indenture is authorized or permitted by the Indenture and that all conditions precedent to its execution and delivery have been complied with.

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Company, the Guarantors and the Trustee mutually covenant and agree for the benefit of each other and the equal and ratable benefit of the Holders of the Notes as follows:

1. Defined Terms. Capitalized terms used but not defined herein shall have the meanings assigned thereto in the Indenture.
2. Definition of Borrowing Base. Clause (2) of the definition of "Borrowing Base" as set forth in the Indenture is hereby amended and restated in its entirety as follows:

“(2) 75% of the book value (calculated in accordance with GAAP) of the inventory of the Issuer and the Guarantors, on a consolidated basis, on such date.”

3. Definition of “Collateral Coverage Event” as set forth in the Indenture is hereby amended and restated in its entirety as follows:

“‘Collateral Coverage Event’ shall be deemed to have occurred if, prior to a Fall-Away Event, as of the last day of any two consecutive fiscal quarters of the Issuer each ending on or after August 4, 2018 (which is the last day of the second fiscal quarter of the fiscal year of the Issuer ending on February 2, 2019), the Borrowing Base as of each such day is less than the principal amount of the Issuer’s consolidated indebtedness for borrowed money outstanding on such day that is secured by Liens on the Collateral.”

4. Effectiveness. This Supplemental Indenture and the amendments to the Indenture set forth herein shall become effective upon execution by all parties hereto.

5. Ratification of Indenture: Supplemental Indenture Part of Indenture. Except as expressly amended or supplemented hereby, the Indenture is in all respects ratified and confirmed and all the terms, conditions and provisions thereof shall remain in full force and effect. This Supplemental Indenture shall form a part of the Indenture for all purposes, and every Holder of Notes heretofore or hereafter authenticated and delivered shall be bound hereby.

6. Governing Law. **THIS SUPPLEMENTAL INDENTURE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK.**

7. Trustee Makes No Representation. The Trustee makes no representation as to the validity or sufficiency of this Supplemental Indenture. The recitals contained herein shall be taken as the statements of the Company and the Guarantors, and the Trustee assumes no responsibility for their correctness. This Supplemental Indenture is executed and accepted by the Trustee subject to all the terms and conditions set forth in the Indenture with the same force and effect as if those terms and conditions were repeated at length herein and made applicable to the Trustee with respect hereto. In entering into this Supplemental Indenture, the Trustee shall be entitled to the benefit of every provision of the Indenture relating to the conduct or affecting the liability or affording protection to the Trustee, whether or not elsewhere herein so provided.

8. Counterparts. The parties may sign any number of copies of this Supplemental Indenture. Each signed copy shall be an original, but all of them together represent the same agreement. The exchange of copies of this Supplemental Indenture and of signature pages by facsimile or PDF transmission shall constitute effective execution and delivery of this Supplemental Indenture as to the parties hereto and may be used in lieu of the


original Indenture for all purposes. Signatures of the parties hereto transmitted by facsimile or PDF shall be deemed to be their original signatures for all purposes.

9. Effect of Headings. The Section headings herein are for convenience only and shall not affect the construction thereof.

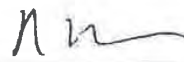
[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture to be duly executed, as of the day and year first written above.


SEARS HOLDINGS CORPORATION

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

SEARS ROEBUCK ACCEPTANCE CORP.

By:   
Name: Robert A. Riecker  
Title: Vice President, Finance

KMART CORPORATION

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

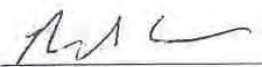
*[Signature Page to Fourth Supplemental Indenture]*




A&E FACTORY SERVICE, LLC

By:   
Name: Robert A. Riecker  
Title: Vice President

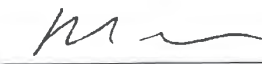
A&E HOME DELIVERY, LLC

By:   
Name: Robert A. Riecker  
Title: Vice President

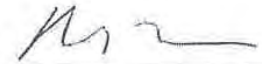
A&E LAWN & GARDEN, LLC

By:   
Name: Robert A. Riecker  
Title: Vice President


A&E SIGNATURE SERVICE, LLC

By:   
Name: Robert A. Riecker  
Title: Vice President

CALIFORNIA BUILDER APPLIANCES, INC.


By:   
Name: Robert A. Riecker  
Title: Vice President

FLORIDA BUILDER APPLIANCES, INC.


By:   
Name: Robert A. Riecker  
Title: Vice President

*[Signature Page to Fourth Supplemental Indenture]*


KLC, INC.

By:   
Name: Robert A. Riecker  
Title: Vice President

KMART HOLDING CORPORATION


By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

KMART OF MICHIGAN, INC.


By:   
Name: Robert A. Riecker  
Title: Vice President

KMART OF WASHINGTON LLC

By: Kmart Corporation, as Sole Member

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

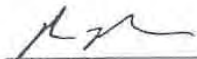
KMART OPERATIONS LLC

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

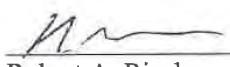
*[Signature Page to Fourth Supplemental Indenture]*

JX 132-135


KMART STORES OF ILLINOIS LLC  
By: Kmart Corporation, as Sole Member

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

KMART STORES OF TEXAS LLC  
By: Kmart Corporation, as Sole Member

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer


KMART.COM LLC  
By: BlueLight.com, as Sole Member

By:   
Name: Robert A. Riecker  
Title: Vice President

MYGOFER LLC  
By: Kmart Corporation, as Sole Member

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer


PRIVATE BRANDS, LTD.

By:   
Name: Robert A. Riecker  
Title: Vice President


*[Signature Page to Fourth Supplemental Indenture]*

JX 132-136

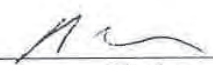
SEARS BRANDS MANAGEMENT  
CORPORATION

By:   
Name: Robert A. Riecker  
Title: Vice President


SEARS HOLDINGS MANAGEMENT  
CORPORATION

By:   
Name: Robert A. Riecker  
Title: President


SEARS HOME IMPROVEMENT PRODUCTS,  
INC.

By:   
Name: Robert A. Riecker  
Title: President

SEARS OPERATIONS LLC


By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

SEARS PROTECTION COMPANY

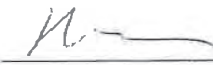
By:   
Name: Robert A. Riecker  
Title: Vice President

*[Signature Page to Fourth Supplemental Indenture]*

SEARS PROTECTION COMPANY (FLORIDA),  
L.L.C.

By:   
Name: Robert A. Riecker  
Title: Vice President

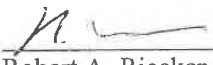
SEARS, ROEBUCK AND CO.

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

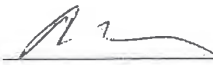
SEARS, ROEBUCK DE PUERTO RICO, INC.

By:   
Name: Robert A. Riecker  
Title: Vice President

SOE, INC.

By:   
Name: Robert A. Riecker  
Title: Vice President

STARWEST, LLC

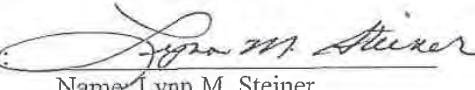
By:   
Name: Robert A. Riecker  
Title: Vice President

*[Signature Page to Fourth Supplemental Indenture]*

JX 132-138



WILMINGTON TRUST, NATIONAL  
ASSOCIATION  
As Trustee and Collateral Agent

By:   
Name: Lynn M. Steiner  
Title: Vice President

*[Signature Page to Fourth Supplemental Indenture]*

## **EXHIBIT F**

EXECUTION VERSION

**FIFTH SUPPLEMENTAL INDENTURE**

This FIFTH SUPPLEMENTAL INDENTURE, dated as of March 20, 2018 (this "Supplemental Indenture"), is entered into by and among Sears Holdings Corporation (the "Company"), the Guarantors (as defined in the Indenture), and Wilmington Trust, National Association, as successor Trustee and Collateral Agent (the "Trustee").

W I T N E S S E T H

WHEREAS the Company and the Guarantors have heretofore executed and delivered to the Trustee an Indenture, dated as of October 12, 2010 (as amended, supplemented or otherwise modified in accordance with its terms, the "Indenture"), providing for the issuance of 6-5/8% Senior Secured Notes due 2018, in aggregate principal amount of \$1,250,000,000 (the "Notes");

WHEREAS Section 8.02(a) of the Indenture provides that with the consent of the Holders of at least a majority in aggregate principal amount of the outstanding Notes, other than notes held by the Company or affiliates of the Company (the "Requisite Consents"), the Company, the Guarantors and the Trustee may amend or supplement the Indenture, the Notes or the Security Documents, subject to certain exceptions;

WHEREAS, the Company has solicited consents (the "Consent Solicitation") from eligible Holders of the Notes to certain proposed amendments to the Indenture as set forth herein (the "Proposed Amendments") pursuant to the terms of the Company's Confidential Offering Memorandum and Consent Solicitation Statement dated February 15, 2018 (the "Offering Memorandum");

WHEREAS, the Company has offered pursuant to the Offering Memorandum to exchange the Notes for new 6-5/8% Senior Secured Convertible PIK Toggle Notes due 2019 (the "Exchange Offer");

WHEREAS, pursuant to the Consent Solicitation, the Requisite Consents for the adoption of the Proposed Amendments have been obtained, and this Supplemental Indenture complies with the requirements of Article 8 of the Indenture;

WHEREAS the execution and delivery of this Supplemental Indenture has been authorized by the Board of Directors of the Company, and the Company has requested the Trustee join with it in the execution and delivery of this Supplemental Indenture;

WHEREAS in accordance with Section 8.06 and Section 12.04 of the Indenture, the Company has delivered an Officer's Certificate and an Opinion of Counsel to the Trustee stating that the Supplemental Indenture is authorized or permitted by the Indenture and that all conditions precedent to its execution and delivery have been complied with.

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Company, the Guarantors and the Trustee mutually covenant and agree for the benefit of each other and the equal and ratable benefit of the Holders of the Notes as follows:

JX 132-141

1. Defined Terms. Capitalized terms used but not defined herein shall have the meanings assigned thereto in the Indenture.

2. The Indenture is hereby amended by deleting the following sections of the Indenture in their entirety:

- Section 4.02 Reports to Holders
- Section 4.04 Limitation on Liens
- Section 4.05 Limitation on Sale and Leaseback Transactions
- Section 4.06 Additional Guarantees
- Section 4.07 Change of Control Offer
- Section 4.08 Collateral Coverage Offer
- Section 5.01 Limitations on Mergers and Sales of Assets (only with respect to clauses (b) and (c))
- Section 6.01 Events of Default (only with respect to clause (6))
- Section 11.01(b) (solely to the extent that it requires the liens securing the Notes to be subject only to Permitted Liens)

Any and all references to any sections of the Indenture or Global Notes which are deleted by any section of this Supplemental Indenture, and any and all obligations related solely to such deleted sections throughout the Indenture or Global Notes, are of no further force or effect. Any and all terms defined in the Indenture or Global Notes which are (i) used in any sections of the Indenture or Global Notes deleted by any Section of this Supplemental Indenture and (ii) not otherwise used in any other section of the Indenture or Global Notes not affected by this Supplemental Indenture, are hereby deleted.

3. The following defined terms contained in the Indenture are hereby amended and restated in their entirety as follows:

*“Additional First Lien Obligations”* means any indebtedness of the Issuer or any Restricted Subsidiary, other than the Credit Agreement Obligations, that is secured by a Lien on the Collateral ranking contractually prior to the Notes Liens; *provided* that the representative of such Additional First Lien Obligations executes a joinder agreement to the Intercreditor Agreement (or another intercreditor agreement on terms not less favorable to the Holders of Notes than the Intercreditor Agreement) agreeing to be bound thereby. At the Issuer’s option, any indebtedness secured by a Lien may be *“Additional First Lien Obligations”*.

*“Pari Passu Junior Lien Obligations”* means any indebtedness of the Issuer or any Guarantor that is secured by a Lien on the Collateral equally and ratably with the Notes Liens; *provided* that the representative of such Pari Passu Junior Lien Obligations executes a joinder

agreement to the Security Agreement and the Intercreditor Agreement or enters into an additional intercreditor agreement with the Collateral Agent providing that any amounts received in respect of the Collateral in connection with an enforcement of the Notes Liens or the Liens securing such Pari Passu Junior Lien Obligations (or received in respect of such Liens in any bankruptcy or insolvency proceeding) shall, subject to the Intercreditor Agreement, after payment of expenses of the Collateral Agent and the collateral agent for each other class of Pari Passu Junior Lien Obligations, be distributed to the Trustee and each other agent for the holders of Pari Passu Junior Lien Obligations on a *pro rata* basis based on the amount of outstanding obligations of each such class. At the Issuer's option, any indebtedness secured by a Lien may be "Pari Passu Junior Lien Obligations".

4. The Intercreditor Agreement is hereby amended and restated in its entirety, subject to the execution thereof by the other parties thereto, in the form attached hereto as Exhibit A and the Collateral Trustee is authorized and directed by the requisite holders of the Notes and by the Issuer to enter into an amended and restated Intercreditor Agreement in the form attached hereto as Exhibit A.

5. The Security Agreement is hereby amended and restated in its entirety, subject to the execution thereof by the other parties thereto, in the form attached hereto as Exhibit B and the Trustee and Collateral Trustee is authorized and directed by the requisite holders of the Notes and by the Issuer to enter into an amended and restated Security Agreement in the form attached hereto as Exhibit B.

6. Effectiveness. This Supplemental Indenture shall become effective upon execution by all parties hereto, however the amendments to the Indenture and the Security Documents set forth in Sections 2 through 5 above shall not become operative until the Exchange Offer is consummated and shall become effective and operative immediately and automatically, without further notice or other action by any party, upon consummation of the Exchange Offer.

7. Ratification of Indenture; Supplemental Indenture Part of Indenture. Except as expressly amended or supplemented hereby, the Indenture is in all respects ratified and confirmed and all the terms, conditions and provisions thereof shall remain in full force and effect. This Supplemental Indenture shall form a part of the Indenture for all purposes, and every Holder of Notes heretofore or hereafter authenticated and delivered shall be bound hereby.

8. Governing Law. **THIS SUPPLEMENTAL INDENTURE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK.**

9. Trustee Makes No Representation. The Trustee makes no representation as to the validity or sufficiency of this Supplemental Indenture. The recitals contained herein shall be taken as the statements of the Company and the Guarantors, and the Trustee assumes no responsibility for their correctness. This Supplemental Indenture is executed and accepted by the Trustee subject to all the terms and conditions set forth in the Indenture with the same force and effect as if those terms and conditions were repeated at length herein and made applicable to the Trustee with respect hereto. In entering into this Supplemental Indenture, the Trustee shall be entitled to the benefit of every provision of the Indenture relating to the conduct or affecting the liability or affording protection to the Trustee, whether or not elsewhere herein so provided.

10. Counterparts. The parties may sign any number of copies of this Supplemental Indenture. Each signed copy shall be an original, but all of them together represent the same agreement. The exchange of copies of this Supplemental Indenture and of signature pages by facsimile or PDF transmission shall constitute effective execution and delivery of this Supplemental Indenture as to the parties hereto and may be used in lieu of the original Indenture for all purposes. Signatures of the parties hereto transmitted by facsimile or PDF shall be deemed to be their original signatures for all purposes.

11. Effect of Headings. The Section headings herein are for convenience only and shall not affect the construction thereof.


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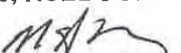
18-23538-rdd Claim 64-1 Filed 02/20/19 Pg 145 of 213

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture to be duly executed, as of the day and year first written above.


SEARS HOLDINGS CORPORATION

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

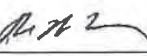
CALIFORNIA BUILDER APPLIANCES, INC.  
FLORIDA BUILDER APPLIANCES, INC.  
KMART CORPORATION  
KMART HOLDING CORPORATION  
KMART OPERATIONS LLC  
SEARS OPERATIONS LLC  
SEARS, ROEBUCK AND CO.

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

SEARS HOLDINGS MANAGEMENT  
CORPORATION  
SEARS HOME IMPROVEMENT PRODUCTS,  
INC.

By:   
Name: Robert A. Riecker  
Title: President

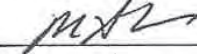
SEARS ROEBUCK ACCEPTANCE CORP.

By:   
Name: Robert A. Riecker  
Title: Vice President, Finance

*[Signature Page to Fifth Supplemental Indenture]*


JX 132-145

A&E FACTORY SERVICE, LLC  
A&E HOME DELIVERY, LLC  
A&E LAWN & GARDEN, LLC  
A&E SIGNATURE SERVICE, LLC  
KLC, INC.  
KMART OF MICHIGAN, INC.  
PRIVATE BRANDS, LTD.  
SEARS BRANDS MANAGEMENT  
CORPORATION  
SEARS PROTECTION COMPANY  
SEARS PROTECTION COMPANY (FLORIDA),  
L.L.C.  
SEARS, ROEBUCK DE PUERTO RICO, INC.  
SOE, INC.  
STARWEST, LLC

By:   
Name: Robert A. Riecker  
Title: Vice President

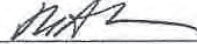
KMART.COM LLC

By: BlueLight.com, Inc., its Member

By:   
Name: Robert A. Riecker  
Title: Vice President

KMART OF WASHINGTON LLC  
KMART STORES OF ILLINOIS LLC  
KMART STORES OF TEXAS LLC  
MYGOFFER LLC

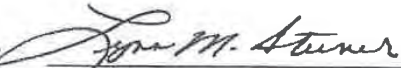
By: Kmart Corporation, its Member

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

*[Signature Page to Fifth Supplemental Indenture]*

JX 132-146

WILMINGTON TRUST, NATIONAL  
ASSOCIATION, as Trustee and Collateral Agent

By:   
Name: Lynn M. Steiner  
Title: Vice President

*[Signature Page to Fifth Supplemental Indenture]*

## **EXHIBIT G**

**Execution Version**

**THIS INSTRUMENT OF RESIGNATION, APPOINTMENT, AND ACCEPTANCE** (this "Instrument"), dated as of June 25, 2014 ("Effective Date"), is by and among Sears Holdings Corporation, a corporation duly organized and existing under the laws of the State of Delaware (the "Company"), Wilmington Trust, National Association, a national banking association duly organized and existing under the laws of the United States of America (the "Successor Trustee"), and Wells Fargo Bank, National Association, a national banking association duly organized and existing under the laws of the United States of America (the "Resigning Trustee"). Capitalized terms not otherwise defined herein shall have the same meaning ascribed to such terms in the Indenture (as defined below).

**RECITALS**

WHEREAS, pursuant to an Indenture dated as of October 12, 2010 (as supplemented, the "Indenture") between the Company, the Guarantors party thereto and the Resigning Trustee, the Company issued the aggregate of \$1,250,000,000 of its 6.625% Senior Secured Notes due 2018 (the "Old Notes");

WHEREAS, pursuant to the Indenture, on September 6, 2011, the Company exchanged \$987,430,000 in aggregate principal amount of the Old Notes for an equal principal amount of notes (together with the Old Notes, the "Notes"), the terms of which are identical in all material respects to the terms of the Old Notes, except that such notes issued in the exchange were registered under the Securities Act of 1933, as amended, are generally not subject to transfer restrictions, are not entitled to registration rights and do not have the right to earn additional interest under circumstances relating to the Company's registration obligations;

WHEREAS, the Company appointed the Resigning Trustee as Trustee, Collateral Agent, Registrar, Paying Agent, Depository Custodian and Agent for service of notices and demands in connection with the Notes under the Indenture and the Security Documents;

WHEREAS, there is currently issued and outstanding \$1,240,000,000 in aggregate principal amount of the Notes;

WHEREAS, in connection with the issuance of the Notes, the Resigning Trustee, the Company and certain of its Subsidiaries, entered into that certain Security Agreement, dated as of October 12, 2010 (the "Security Agreement");

WHEREAS, in connection with the issuance of the Notes, the Resigning Trustee and the ABL Agents party thereto entered into that certain Intercreditor Agreement, dated as of October 12, 2010 (the "Intercreditor Agreement");

WHEREAS, Section 7.04 of the Indenture provides that the Trustee may at any time resign by giving written notice of such resignation to the Company and to the

Holders and Section 7.07 of the Indenture provides that the Company shall promptly appoint a successor Trustee;

WHEREAS, Section 7.07 of the Indenture provides that any successor Trustee appointed in accordance with the Indenture shall execute, acknowledge and deliver to the Company and to its predecessor Trustee an instrument accepting such appointment under the Indenture, and thereupon the resignation of the predecessor Trustee shall become effective and such successor Trustee, without any further act, deed or conveyance, shall become vested with all rights, powers, duties and obligations of the predecessor Trustee;

WHEREAS, Section 7.01(o) of the Indenture provides that all of the rights of the Trustee are exercisable by the Trustee in its other capacities under the Indenture, including without limitation, as Registrar, Paying Agent, Depository Custodian and Collateral Agent;

WHEREAS, the Resigning Trustee has given written notice dated May 7, 2014 to the Company and to the Holders of Securities that it is resigning under the Indenture;

WHEREAS, the Resigning Trustee desires to resign as Trustee, Collateral Agent, Registrar, Paying Agent, Depository Custodian and Agent for service of notices and demands in connection with the Notes, and the Company desires to appoint the Successor Trustee as Trustee, Collateral Agent, Registrar, Paying Agent, Depository Custodian and Agent for service of notices and demands in connection with the Notes to succeed the Resigning Trustee under the Indenture and the Security Documents; and

WHEREAS, the Successor Trustee is willing to and does hereby accept the appointment as Trustee, Collateral Agent, Registrar, Paying Agent, Depository Custodian, and Agent for service of notices and demands in connection with the Notes under the Indenture and the Security Documents.

NOW, THEREFORE, in consideration of the covenants herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. *Acceptance of Resignation of Resigning Trustee; Appointment of Successor Trustee.* Pursuant to Sections 7.01(o) and 7.07 of the Indenture, the Resigning Trustee hereby resigns as Trustee, Collateral Agent, Registrar, Paying Agent, Depository Custodian and Agent for service of notices and demands in connection with the Notes under the Indenture and the Security Documents. The Company accepts the resignation of the Resigning Trustee as Trustee, Collateral Agent, Registrar, Paying Agent, Depository Custodian and Agent for service of notices and demands in connection with the Notes and hereby appoints the Successor Trustee as Trustee, Collateral Agent, Registrar, Paying Agent, Depository Custodian and Agent for service of notices and demands in connection with the Notes under the Indenture and the Security Documents.

2. *Company Representations, Warranties and Covenants.* The Company represents and warrants to the Successor Trustee that:



- a. It is duly organized and validly existing;
- b. The execution and delivery of this Instrument have been duly authorized by the Company;
- c. The Indenture and the First Supplemental Indenture, dated as of April 5, 2011 (the "First Supplemental Indenture") were validly and lawfully executed and delivered by the Company and are in full force and effect and the Notes were validly issued by the Company;
- d. The Security Documents, and each amendment or supplement thereto, if any, including the Assumption Agreement dated April 5, 2011 in connection with Private Brands, Ltd. becoming an Additional Guarantor and party to the Security Agreement (the "Assumption Agreement"), were validly and lawfully executed and delivered by the Company and are in full force and effect;
- e. Other than the First Supplemental Indenture, the Assumption Agreement, the Release of Guarantors dated October 11, 2012 in connection with the release of Sears Home Appliance Showrooms, LLC, Sears Authorized Hometown Stores, LLC, and Sears Outlet Stores, LLC, and the Instrument Evidencing Release of Guarantee and Release of Liens on Collateral dated April 4, 2014 in connection with the release of Lands' End, Inc. and Lands' End Direct Merchants, Inc., the Indenture and Security Documents have not been amended or supplemented and no terms thereof have been waived;
- f. The Company has performed or fulfilled each covenant, agreement and condition on its part to be performed or fulfilled under the Indenture and the Security Documents on or prior to the date hereof;
- g. No Default, Event of Default under the Indenture or Security Documents has occurred or is continuing, and no other event has occurred and is continuing which is, or after notice or lapse of time would become, an Event of Default under the Indenture;
- h. No covenant or condition contained in the Indenture or Security Documents has been waived by the Company or, to the best of the Company's knowledge, by Holders of the percentage in aggregate principal amount of the Notes required to effect any such waiver;
- i. There is no action, suit or proceeding pending or, to the best of the Company's knowledge, threatened against the Company before any court or any governmental authority arising out of any act or omission of the Company under the Indenture;
- j. All conditions precedent relating to the appointment of Wilmington Trust, National Association as successor Trustee, Collateral Agent, Registrar,

Paying Agent and Agent for service of notices and demands in connection with the Notes under the Indenture and the Security Documents have been complied with by the Company;

- k. Other than the Security Agreement and the Intercreditor Agreement, no other Security Documents have been executed and delivered;
- l. No action is required under the Intercreditor Agreement in connection with the succession evidenced by this Agreement;
- m. The Company will provide, as of or promptly after the Effective Date, updated Schedules 1, 2 and 3 to the Security Agreement, reflecting the changes resulting from the Assumption Agreement, the Release of Guarantors dated October 11, 2012 and the Instrument Evidencing Release of Guarantee and Release of Liens on Collateral dated April 4, 2014; and
- n. To the extent not delivered by the Resigning Trustee pursuant to section 3.c below, the Company shall deliver to Successor Trustee, as of or promptly after the Effective Date hereof, all of the documents listed in Exhibit B hereto.

3. **Resigning Trustee Representations, Warranties and Covenants.** The Resigning Trustee hereby represents and warrants to the Successor Trustee that:

- a. No covenant or condition contained in the Indenture or Security Documents has been waived by the Resigning Trustee or, to the best of the Responsible Officer's knowledge who is signing this document, by the Holders of the percentage in aggregate principal amount of the Notes required by the Indenture or Security Documents to effect any such waiver;
- b. There is no action, suit or proceeding pending or, to the best of the Responsible Officer's knowledge who is signing this document, threatened against the Resigning Trustee before any court or governmental authority arising out of any action or omission by the Resigning Trustee as Trustee, Collateral Agent, Paying Agent, Registrar, Depository Custodian and Agent for service of notices and demands in connection with the Notes under the Indenture and the Security Documents;
- c. Resigning Trustee shall deliver to Successor Trustee, as of or promptly after the Effective Date hereof, all of the documents in its possession listed in Exhibit B hereto;
- d. The execution and delivery of this Instrument have been duly authorized by the Resigning Trustee, and this Instrument constitutes the Resigning Trustee's legal, valid, binding and enforceable obligation;

e. The Resigning Trustee certifies that \$1,240,000,000 in principal amount of the Notes is outstanding and all interest accrued through but not including April 15, 2014 has been paid;

f. To the best of the Resigning Trustee's knowledge, no Default or Event of Default has occurred under the Indenture and no event has occurred and is continuing which is, or after notice or lapse of time would become, an Event of Default under the Indenture;

g. Other than the First Supplemental Indenture, the Assumption Agreement, the Release of Guarantors dated October 11, 2012 in connection with the release of Sears Home Appliance Showrooms, LLC, Sears Authorized Hometown Stores, LLC, and Sears Outlet Stores, LLC, and the Instrument Evidencing Release of Guarantee and Release of Liens on Collateral dated April 4, 2014 in connection with the release of Lands' End, Inc. and Lands' End Direct Merchants, Inc., the Indenture and Security Documents have not been amended or supplemented and no terms thereof have been waived; and

h. To the best of the Resigning Trustee's knowledge, no action is required under the Intercreditor Agreement in connection with the succession evidenced by this Agreement.

4. **Successor Trustee Representation and Warranty.** The Successor Trustee represents and warrants to the Resigning Trustee and the Company that:

a. It is eligible to serve as Trustee under Section 7.05 of the Indenture and is not disqualified under the provisions of Section 7.06 of the Indenture.

b. This Instrument has been duly authorized, executed and delivered on behalf of Successor Trustee and constitutes its legal, valid and binding obligation, enforceable in accordance with its terms.

5. **Acceptance by Successor Trustee.** The Successor Trustee hereby accepts appointment as Trustee, Collateral Agent, Registrar, Paying Agent, Depository Custodian, and Agent for service of notices and demands in connection with the Notes under the Indenture and the Security Documents. The Successor Trustee will perform said rights, powers, and duties upon the terms and conditions set forth in the Indenture. Promptly after the execution and delivery of this Instrument, the Successor Trustee shall cause a notice, a form of which is annexed hereto as Exhibit A, to be sent to each Holder of the Notes. References in the Indenture to "Corporate Trust Office" or other similar terms shall be deemed to refer to the corporate trust office of the Successor Trustee, which is currently located at: 50 South Sixth Street, Suite 1290, Minneapolis, Minnesota 55402, Attention: Sears Holdings Corp. Administrator.

6. **Assignment etc. by Resigning Trustee.** Effective on the Effective Date, the Resigning Trustee hereby confirms, assigns, transfers, delivers and conveys to the

Successor Trustee, as Trustee under the Indenture, upon the trusts expressed in the Indenture, all rights, powers, trusts privileges, duties, and obligations which the Resigning Trustee now holds under and by virtue of the Indenture and the Security Documents, and effective as of such date does hereby pay over to the Successor Trustee any and all property and moneys held by the Resigning Trustee under and by virtue of the Indenture and the Security Documents.

7. **Additional Documentation.** The Resigning Trustee, for the purposes of, and to the extent necessary to, more fully and certainly vesting in and confirming to the Successor Trustee the rights, powers, trusts, privileges, duties, and obligations hereby assigned, transferred, delivered and conveyed, agrees, upon reasonable written request of the Successor Trustee or the Company, to execute, acknowledge, and deliver such further instruments of conveyance and further assurance and to do such other things as may be reasonably requested by the Successor Trustee or the Company.

8. **Choice of Laws.** This Instrument shall be governed by the laws of the State of New York.

9. **Counterparts.** This Instrument may be executed in any number of counterparts, each of which, when so executed and delivered, shall be an original, but all counterparts shall constitute but one Instrument.

10. **Survival of Company's Obligations to Resigning Trustee.** Notwithstanding the resignation of the Resigning Trustee as Trustee under the Indenture, the Company shall remain obligated under the Indenture to compensate, reimburse, and indemnify the Resigning Trustee as provided in the Indenture, and nothing contained in this Instrument shall in any way abrogate the obligations of the Company to the Resigning Trustee under the Indenture or any lien created in favor of the Resigning Trustee thereunder.

11. **Notices.** All notices, whether faxed or mailed, will be deemed received when sent pursuant to the following instructions:

TO THE SUCCESSOR TRUSTEE:

Wilmington Trust, National Association  
Corporate Capital Markets  
50 South Sixth Street, Suite 1290  
Minneapolis, MN 55402  
Telephone: 612-217-5667  
Fax: 612-217-5651  
Attention: Sears Holdings Corp. Administrator

TO THE RESIGNING TRUSTEE:

Wells Fargo Bank, National Association  
Attn: Corporate Trust Services  
10 South Wacker Drive, 13<sup>th</sup> Floor  
Chicago, IL 60606  
Telephone: 312-845-4385  
Fax: 312-726-2158  
Attention: Sears Holdings Corp. Administrator

TO THE COMPANY:

Sears Holdings Corporation  
3333 Beverly Road  
Hoffman Estates, IL 60179  
Telephone: 847-286-2500  
Fax: 847-286-4511  
Attention: Treasurer

12. **Effectiveness.** This Instrument, the resignation of the Resigning Trustee as Trustee, Collateral Agent and Agent for service of notices and demands in connection with the Notes and the appointment of the Successor Trustee as Trustee, Collateral Agent and Agent for service of notices and demands in connection with the Notes under the Indenture and the Security Documents shall be effective as of the close of business on the date first set forth above, upon the execution and delivery hereof by each of the parties hereto; *provided*, that the resignation of the Resigning Trustee as Registrar, Paying Agent and Depository Custodian and the appointment of the Successor Trustee as Registrar, Paying Agent and Depository Custodian shall be effective on July 10, 2014 which is ten (10) business days after the date first above written.

IN WITNESS WHEREOF, the parties hereto have executed this Instrument as  
of the date set forth above.

**SEARS HOLDINGS CORPORATION**, as Company

By  \_\_\_\_\_

Its Vice President and Treasurer

**WILMINGTON TRUST, NATIONAL ASSOCIATION**  
as Successor Trustee

By \_\_\_\_\_

Its \_\_\_\_\_

**WELLS FARGO BANK, NATIONAL ASSOCIATION**  
as Resigning Trustee

By \_\_\_\_\_

Its \_\_\_\_\_



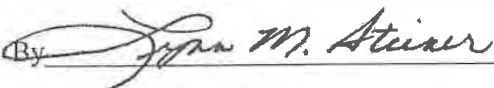
IN WITNESS WHEREOF, the parties hereto have executed this Instrument as  
of the date set forth above.

**SEARS HOLDINGS CORPORATION**, as Company

By \_\_\_\_\_

Its \_\_\_\_\_

**WILMINGTON TRUST, NATIONAL ASSOCIATION**  
as Successor Trustee

By  \_\_\_\_\_

Its \_\_\_\_\_ Vice President

**WELLS FARGO BANK, NATIONAL ASSOCIATION**,  
as Resigning Trustee

By \_\_\_\_\_

Its \_\_\_\_\_

IN WITNESS WHEREOF, the parties hereto have executed this Instrument as  
of the date set forth above.

**SEARS HOLDINGS CORPORATION**, as Company

By \_\_\_\_\_

Its \_\_\_\_\_

**WILMINGTON TRUST, NATIONAL ASSOCIATION**  
as Successor Trustee

By \_\_\_\_\_

Its \_\_\_\_\_

**WELLS FARGO BANK, NATIONAL ASSOCIATION,**  
as Resigning Trustee

By  \_\_\_\_\_

Its Vice President \_\_\_\_\_

Execution Version

EXHIBIT A

NOTICE OF APPOINTMENT OF SUCCESSOR TRUSTEE

To the Holders of:

Sears Holdings Corporation

6.625% Senior Secured Notes due 2018

CUSIP Nos.: 812350AC0 (144A), U8124CAB0 (RegS), 812350AD8 (AI), and  
812350AE6 (Reg)

We hereby notify you of the resignation of Wells Fargo Bank, National Association, as Trustee, Collateral Agent, Registrar, Paying Agent and Agent for service of notices and demands under the Indenture, dated as of October 12, 2010, pursuant to which your Notes were issued and are outstanding.

Sears Holdings Corporation has appointed Wilmington Trust, National Association, whose Corporate Trust Office is located at 50 South Sixth Street, Suite 1290, Minneapolis, Minnesota 55402, Attention: Sears Holdings Corp. Administrator and Wilmington Trust, National Association has accepted appointment as successor Trustee, Collateral Agent, Registrar, Paying Agent, Depository Custodian and Agent for service of notices and demands under the Indenture.

Wells Fargo Bank, National Association's resignation as Trustee, Collateral Agent and Agent for service of notices and demands and Wilmington Trust, National Association's appointment as Trustee, Collateral Agent and Agent for service of notices and demands under the Indenture were effective as of the opening of business on June 26, 2014 and Wells Fargo Bank, National Association's resignation as Registrar, Paying Agent and Depository Custodian and Wilmington Trust, National Association's appointment as Registrar, Paying Agent and Depository Custodian will be effective as of the opening of business on July 10, 2014.

Dated: [ ], 2014

Wilmington Trust, National Association,  
As Trustee

EXHIBIT B

Documents to be delivered by Resigning Trustee to Successor Trustee as to the Indenture and Security Documents:

1. Copies of fully executed versions of the Indenture, the First Supplemental Indenture, the Security Agreement, and the Intercreditor Agreement, the Assumption Agreement, the Release of Guarantors dated October 11, 2012 in connection with the release of Sears Home Appliance Showrooms, LLC, Sears Authorized Hometown Stores, LLC, and Sears Outlet Stores, LLC, and the Instrument Evidencing Release of Guarantee and Release of Liens on Collateral dated April 4, 2014 in connection with the release of Lands' End, Inc. and Lands' End Direct Merchants, Inc.

2. File of closing documents from original issuance.

3. Certified List of Noteholders as of the Effective Date and as of effective date for the Registrar succession, certificate detail and all "stop transfers" and the reason for such "stop transfers" (or, alternatively, if there are a substantial number of registered Noteholders, the computer tape reflecting the identity of such Noteholders).

4. Copies of any official notices sent by the Trustee to the Noteholders of the Notes pursuant to the terms of the Indenture during the past twelve months.

5. Copies of most recent compliance items, including without limitation, the most recent compliance certificate delivered pursuant to Section 4.03 of the Indenture, most recent SEC reports delivered pursuant to Section 4.02 of the Indenture and most recent annual perfection opinion delivered pursuant to Section 11.02 of the Indenture, delivered to the Resigning Trustee pursuant to terms of the Indenture and Security Documents.

6. The original Global Notes with original face amounts as follows: 812350AC0 (144A) Cert A-1 \$481,030,000 dated October 12, 2010 and Cert A-2 \$500,000,000 dated October 12, 2010; U8124CAB0 (RegS) Cert S-1 \$18,970,000 dated October 12, 2010; 812350AD8 (AI) Cert D-1 \$0.00 dated October 12, 2010; and 812350AE6 (Reg) Cert E-1 \$500,000,000 dated September 6, 2011, Cert E-2 \$487,430,000 dated September 6, 2011 and Cert E-3 \$5,000,000 dated September 28, 2012.

7. Trust account statements (asset & transaction) for the one-year period preceding the date of this Agreement.

8. Securities debt service records.

9. Filed, stamped copies of all existing financing statements.

## **EXHIBIT H**

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**AMENDED AND RESTATED SECURITY AGREEMENT**

among

**SEARS HOLDINGS CORPORATION,  
and certain of its Subsidiaries,  
as Grantors**

and

**WILMINGTON TRUST, NATIONAL ASSOCIATION,  
as Collateral Agent**

Dated as of March 20, 2018

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**THIS SECURITY AGREEMENT is subject to the terms and provisions of the Amended and Restated Intercreditor Agreement, dated as of March 20, 2018 (as such agreement may be amended, restated, amended and restated, supplemented or otherwise modified from time to time), among Wilmington Trust, National Association, as Second Lien Agent and Bank of America, N.A. and Wells Fargo Bank, National Association, each as an ABL Agent and the other persons from time to time party thereto.**



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SCHEDULES

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**AMENDED AND RESTATED SECURITY AGREEMENT**

THIS AMENDED AND RESTATED SECURITY AGREEMENT, dated as of March 20, 2018 (as amended, amended and restated, supplemented or otherwise modified from time to time in accordance with the provisions hereof, this "Agreement"), is made by SEARS HOLDINGS CORPORATION, a Delaware corporation (the "Issuer"), and the subsidiaries of the Issuer from time to time party hereto (the "Subsidiary Obligors" and, together with the Issuer, the "Grantors"), in favor of WILMINGTON TRUST, NATIONAL ASSOCIATION, in its capacity as collateral agent (in such capacity and, together with any successors and assigns, the "Collateral Agent").

**WITNESSETH**

WHEREAS, the Issuer, the Grantors and the Collateral Agent are party to that certain Security Agreement, dated as of October 12, 2010, as amended by that certain First Amendment to Security Agreement, dated as of September 1, 2016 (as further amended, amended and restated, supplemented or otherwise modified from time to time prior to the date hereof, the "Existing Security Agreement");

WHEREAS, the parties hereto desire to amend and restate the Existing Security Agreement as provided herein;

WHEREAS, reference is made to that certain indenture, dated as of October 12, 2010 (as amended, amended and restated, supplemented or otherwise modified from time to time, the "2010 Indenture"), by and among the Issuer, the Guarantors and WILMINGTON TRUST, NATIONAL ASSOCIATION, in its capacity as successor trustee (in such capacity, the "2010 Trustee") and Collateral Agent, pursuant to which the Issuer issued \$1,250,000,000 aggregate original principal of 6 5/8% Senior Secured Notes due 2018 (together with any Exchange Securities (as defined in the 2010 Indenture) and any Additional Notes (as defined in the 2010 Indenture) issued under the 2010 Indenture, the "Senior Secured Notes").

WHEREAS, reference is further made to that certain Second Lien Credit Agreement, dated as of September 1, 2016 (as amended, amended and restated, supplemented or otherwise modified from time to time, the "Second Lien Credit Agreement"), by and among the Issuer, Sears Roebuck Acceptance Corp. and Kmart Corporation, as borrowers, the Guarantors, the lenders from time to time party thereto and JPP, LLC, as administrative agent and collateral administrator (the "Second Lien Credit Agreement Agent"), pursuant to which the borrowers have obtained a term loan in the aggregate amount of \$300 million and established an uncommitted line of credit facility.

WHEREAS, reference is further made to that certain indenture, dated as of the date hereof (as amended, amended and restated, supplemented or otherwise modified from time to time, the "2018 Indenture"), by and among the Issuer, the Guarantors and COMPUTERSHARE TRUST COMPANY, N.A., in its capacity as trustee (in such capacity, the "2018 Trustee"), pursuant to which the Issuer issued \$169,824,000.00 aggregate principal of 6 5/8% Senior Secured Convertible PIK Toggle Notes due 2019 (together with any PIK Interest Notes (or any increase in the principal amount of a Global Note related to PIK Interest) and any Additional Notes issued under the 2018 Indenture, the "Senior Secured Convertible Notes").

WHEREAS, each of the Issuer and each Subsidiary Obligor is either a primary obligor or has unconditionally guaranteed all of the Secured Obligations.

WHEREAS, from time to time after the date hereof, the Issuer may, subject to the terms and conditions of this Agreement and the other Second Lien Documents, incur additional Junior Second Lien Obligations that are secured by Liens ranking equally and ratably with the Liens securing the existing Secured Obligations and entitled to distributions on an equal and ratable basis with the Senior Secured Notes.

WHEREAS, from time to time after the date hereof, the Issuer may, subject to the terms and conditions of this Agreement and the other Second Lien Documents, incur additional Senior Second Lien Obligations that are secured by Liens ranking equally and ratably with the Liens securing the existing Secured Obligations and entitled to distributions on an equal and ratable basis with the Senior Secured Convertible Notes and the obligations under the Second Lien Credit Agreement.

WHEREAS, this Agreement is given by each Grantor in favor of the Collateral Agent for the benefit of the Secured Parties to secure the payment and performance of all Secured Obligations.

WHEREAS, the Issuer, the other Grantors, the Collateral Agent and the ABL Agents, have entered into that certain Second Amended and Restated Intercreditor Agreement, dated as of the date hereof (as amended, modified, supplemented or restated and in effect from time to time, the "Intercreditor Agreement"), establishing the relative rights and priorities of the Secured Parties and the First Lien Secured Parties in respect of the Collateral.

WHEREAS, each Grantor will receive substantial benefits from the issuance and maintenance of the Secured Obligations and each is, therefore, willing to enter into this Agreement.

NOW, THEREFORE, in consideration of the foregoing premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, each Grantor and the Collateral Agent hereby agree as follows:

## SECTION 1. DEFINED TERMS

### 1.1 Definitions.

(a) Unless otherwise defined herein, terms defined in the 2018 Indenture and used herein shall have the meanings given to them in the 2018 Indenture, and the following terms are used herein as defined in the New York UCC: Accounts, Chattel Paper, Control, Documents, Equipment, Fixtures, General Intangibles, Goods, Instruments, Inventory, Proceeds and Supporting Obligations.

(b) The following terms shall have the following meanings:

"ABL Agents" has the meaning provided in the Intercreditor Agreement.

"ABL Obligations" has the meaning provided in the Intercreditor Agreement.

"ABL Secured Parties" has the meaning provided in the Intercreditor Agreement.

"Additional First Lien Agent" means the Person appointed to act as trustee, agent or representative for the holders of Additional First Lien Obligations pursuant to any Additional First Lien Agreement.

"Additional First Lien Agreement" means any indenture, credit agreement or other agreement, if any, pursuant to which any Grantor has or will incur Additional First Lien Obligations.



“Agreement” has the meaning provided in the preamble hereof.

“Collateral” has the meaning provided in Section 2.1 hereof.

“Collateral Agent” has the meaning provided in the preamble hereof.

“Copyrights” means (i) all copyrights arising under the laws of the United States, any other country or any political subdivision thereof, whether registered or unregistered and whether published or unpublished, all registrations and recordings thereof, and all applications in connection therewith, including, without limitation, all registrations, recordings and applications in the United States Copyright Office and (ii) the right to obtain all renewals thereof.

“Copyright Licenses” means any written agreement naming any Grantor as licensor or licensee granting any right under any Copyright, including, without limitation, the grant of rights to manufacture, distribute, exploit and sell materials derived from any Copyright.

“Credit Agreement” means the Third Amended and Restated Credit Agreement, dated as of July 21, 2015, among the Issuer, Sears Roebuck Acceptance Corp., Kmart Corporation, the lenders from time to time party thereto, the issuing lenders from time to time party thereto, Bank of America, N.A., as administrative agent, co-collateral agent and swingline lender, Wells Fargo Bank, National Association, as co-collateral agent, together with the related documents thereto (including, without limitation, any guarantee agreements and security documents), in each case as such agreements have been or may be amended (including any amendment and restatement thereof), supplemented or otherwise modified, replaced or refinanced from time to time, including any agreement extending the maturity of, refinancing, replacing or otherwise restructuring (including, without limitation, increasing the amount of available borrowings thereunder or adding Subsidiaries of the Issuer as additional borrowers or guarantors thereunder) all or any portion of the indebtedness under such agreement or any successor or replacement agreement or agreements and whether by the same or any other agent, lender or group of lenders.

“Credit Card Accounts Receivables” means all Accounts together with all income, payments, and proceeds thereof, owed by a credit card payment processor or an issuer of credit cards to the Issuer or any Guarantor resulting from charges by a customer of the Issuer or such Guarantor on credit cards issued by such issuer in connection with the sale of goods by the Issuer or such Guarantor or services performed by the Issuer or such Guarantor.

“Discharge of First Lien Obligations” means the Discharge of ABL Obligations (as defined in the Intercreditor Agreement) and the payment in full in cash of all outstanding Additional First Lien Obligations.

“Discharge of Obligations” means in the case of any series of Secured Obligations, including the Senior Secured Notes, the Senior Secured Convertible Notes and the Second Lien Credit Agreement Obligations, the repayment, discharge or defeasance of such series of Secured Obligations under such agreement or such other event which entitles the Grantors to obtain a release of the Liens securing such Secured Obligations under the Security Documents (including, with respect to the 2010 Indenture and the 2018 Indenture, a discharge or defeasance of the such indenture in accordance with its terms).

“Discharge of Senior Second Lien Obligations” means the occurrence of a Discharge of Obligations with respect to all Senior Second Lien Obligations.

"Event of Default" means (i) an "Event of Default" under and as defined in the 2018 Indenture, the 2010 Indenture or the Second Lien Credit Agreement, or (ii) an "Event of Default" or equivalent term under and as defined in any Junior Second Lien Agreement or any Senior Second Lien Agreement.

"Final Date" means the first date on which a Discharge of Obligations shall have occurred with respect to all of the Secured Obligations.

"First Lien Collateral Agents" means (i) the ABL Agents and (ii) the Additional First Lien Agents.

"First Lien Obligations" means (i) the ABL Obligations and (ii) the Additional First Lien Obligations.

"First Lien Secured Parties" means (i) the ABL Secured Parties and (ii) each Additional First Lien Agent and each holder of Additional First Lien Obligations.

"First Lien Security Agreement" means that certain Third Amended and Restated Guarantee and Collateral Agreement, dated as of July 21, 2015, by and among the Issuer, the grantors party thereto and Bank of America, N.A., Wells Fargo Bank, National Association and General Electric Capital Corporation, as co-collateral agents, as the same has been or may be amended, supplemented or otherwise modified from time to time.

"Grantors" has the meaning provided in the preamble hereof.

"Guarantors" has the meaning provided in the preamble hereof.

"Intellectual Property" means the collective reference to all rights, priorities and privileges relating to intellectual property, whether arising under United States, multinational or foreign laws or otherwise, including, without limitation, all Copyrights, Copyright Licenses, Patents, Patent Licenses, Trademarks and Trademark Licenses, know-how and processes, and all rights to sue at law or in equity for any infringement or other impairment thereof, including the right to receive all proceeds and damages therefrom.

"Intercreditor Agreement" has the meaning provided in the recitals hereof.

"Issuer" has the meaning provided in the preamble hereof.

"Junior Second Lien Agent" means any Person appointed to act as trustee, agent or representative for the holders of a series of Junior Second Lien Obligations pursuant to any Second Lien Document.

"Junior Second Lien Agreement" means any indenture, credit agreement or other agreement, if any, designated as such by the Issuer pursuant to, and as permitted by, Section 7.2 hereof.

"Junior Second Lien Joinder Agreement" means an agreement substantially in the form of Exhibit I hereto.

"Junior Second Lien Obligations" means (i) the Senior Secured Note Obligations and (ii) any other indebtedness and related obligations, including interest, fees and expenses, of the Issuer or any Subsidiary Guarantor that is secured by a Lien on the Collateral ranking equally and ratably with the



Liens securing the Senior Secured Note Obligations (or by the same Liens that secure the Senior Secured Note Obligations, including hereunder) and that is entitled to distributions on an equal and ratable basis with the Senior Secured Note Obligations pursuant to the Security Documents or otherwise; provided that the representative of such Junior Second Lien Obligations executes a joinder agreement (including, without limitation, pursuant to Section 7.2) or amendment to, or amendment and restatement of, the applicable Security Documents and the Intercreditor Agreement, or enters into an additional intercreditor agreement with the Collateral Agent providing that any amounts received in respect of the Collateral in connection with an enforcement of the Liens securing any Second Lien Obligations (or received in respect of such Liens in any bankruptcy or insolvency proceeding) shall, subject to the Intercreditor Agreement and in accordance with Section 5.4 hereof, after payment of all indemnities, compensation and expenses (including the fees and expenses of counsel and experts) payable to the Collateral Agent, the 2010 Trustee, the 2018 Trustee, the Second Lien Credit Agreement Agent and each other trustee or agent for any class of Second Lien Obligations in their capacities as such (which shall be paid first to the Collateral Agent and then among each such trustee or agent on a pro rata basis), be distributed first to each trustee or agent for a class of Senior Second Lien Obligations for distribution to the holders thereof on a pro rata basis based on the amount of outstanding obligations of each such class until all Senior Second Lien Obligations are paid in full and only thereafter to the 2010 Trustee and each other trustee or agent for a class of Junior Second Lien Obligations for distribution to the holders thereof until all Junior Second Lien Obligations are paid in full and thereafter to Holdings. At the Issuer's option (as certified to the Collateral Agent, each Junior Second Lien Agent and each Senior Second Lien Agent pursuant to an Officer's Certificate), any indebtedness of the Issuer or the Subsidiary Guarantors secured by a Lien on the Collateral may be Junior Second Lien Obligations. For the avoidance of doubt, any obligations designated as Junior Second Lien Obligations pursuant to Section 7.2, subject to satisfaction of the requirements set forth therein, shall constitute Junior Second Lien Obligations.

"New York UCC" means the Uniform Commercial Code as from time to time in effect in the State of New York.

"Patents" means (i) all letters patent of the United States, any other country or any political subdivision thereof, all reissues and extensions thereof and all goodwill associated therewith, (ii) all applications for letters patent of the United States or any other country and all divisions, continuations and continuations-in-part thereof and (iii) all rights to obtain any reissues or extensions of the foregoing.

"Patent License" means all agreements, whether written or oral, providing for the grant by or to any Grantor of any right to manufacture, use or sell any invention covered in whole or in part by a Patent.

"Perfection Certificate" means that certain perfection certificate executed and delivered by the Grantors in connection with the execution and delivery of the 2010 Indenture, dated on or about the Issue Date (as defined in the 2010 Indenture).

"Required Secured Parties" means (i) until the Discharge of Senior Second Lien Obligations, the holders of a majority in aggregate principal amount of Senior Second Lien Obligations constituting Secured Obligations, voting together as a single class and (ii) from and after the Discharge of Senior Second Lien Obligations, the holders of a majority in aggregate principal amount of Junior Second Lien Obligations constituting Secured Obligations, voting together as a single class.

"Second Lien Credit Agreement Documents" means the Second Lien Credit Agreement, the Loan Documents (as defined in the Second Lien Credit Agreement) and the Security Documents.

"Second Lien Credit Agreement Obligations" means the collective reference to (i) all obligations, liabilities and indebtedness (including, without limitation, principal, premium, interest (including, without limitation, all interest that accrues after the commencement of any case, proceeding or other action relating to the bankruptcy, insolvency, reorganization or similar proceeding of any Grantor at the rate provided for in the respective documentation, whether or not such claim for post-petition interest is allowed in any such proceeding), fees, costs, expenses and indemnities, including the fees and expenses of counsel) owing to the Collateral Agent, the Second Lien Credit Agreement Agent and holders of the loans and other obligations under the Second Lien Credit Agreement Documents and the due performance and compliance by the Grantors with all of the terms, conditions and agreements contained in the Second Lien Credit Agreement Documents; (ii) any and all sums advanced by the Collateral Agent in accordance with any of the Second Lien Credit Agreement Documents in order to preserve the Collateral or preserve its security interest in the Collateral; and (iii) in the event of any proceedings for the collection or enforcement of any indebtedness, obligations or liabilities of the Grantors referred to in clause (i) above, the reasonable expenses of retaking, holding, preparing for sale or lease, selling or otherwise disposing of or realizing on the Collateral, or of any exercise by the Collateral Agent of its rights hereunder, together with reasonable attorneys' fees and court costs.

"Second Lien Documents" means the Second Lien Credit Agreement Documents, the Senior Secured Note Documents, the Senior Secured Convertible Note Documents and any other document or agreement governing any other indebtedness or other obligations that may constitute Secured Obligations, including any applicable Junior Second Lien Agreement and Senior Second Lien Agreement.

"Secured Obligations" means the collective reference to (i) the Senior Secured Note Obligations, (ii) Senior Secured Convertible Note Obligations, (iii) the Second Lien Credit Agreement Obligations, (iv) all other Senior Second Lien Obligations under or in respect of any Senior Second Lien Agreement and any related agreements and documentation, and (v) all other Junior Second Lien Obligations under or in respect of any Junior Second Lien Agreement and any related agreements and documentation.

"Secured Parties" shall mean, collectively, the Collateral Agent, the 2010 Trustee, the holders of Senior Secured Notes, the Second Lien Credit Agreement Agent, the lenders and additional agents under the Second Lien Credit Agreement, the 2018 Trustee, the Holders of Senior Secured Convertible Notes, each Junior Second Lien Agent, each holder of Junior Second Lien Obligations under or pursuant to a Junior Second Lien Agreement, each Senior Second Lien Agent and each holder of Senior Second Lien Obligations under or pursuant to a Senior Second Lien Agreement.

"Securities Act" means the Securities Act of 1933, as amended.

"Security Documents" means this Agreement, the Intercreditor Agreement and each other document entered into to grant a security interest in the Collateral or any other assets to the Collateral Agent for the benefit of the Secured Parties.

"Senior Second Lien Agent" means any Person appointed to act as trustee, agent or representative for the holders of a series of Senior Second Lien Obligations pursuant to any Second Lien Document.

"Senior Second Lien Agreement" means any indenture, credit agreement or other agreement, if any, designated as such by the Issuer pursuant to, and as permitted by, Section 7.2 hereof.

"Senior Second Lien Joinder Agreement" means an agreement substantially in the form of Exhibit I hereto.

"Senior Second Lien Obligations" means the (i) Senior Secured Convertible Note Obligations, (ii) the Second Lien Credit Agreement Obligations, and (iii) any other indebtedness and related obligations, including interest, fees and expenses, of the Issuer or any Subsidiary Guarantor that is secured by a Lien on the Collateral ranking equally and ratably with the Liens securing the obligations in respect of the Senior Secured Convertible Note Obligations (or by the same Liens that secure obligations in respect of the Senior Secured Convertible Note Obligations and Second Lien Credit Agreement Obligations, including hereunder) and that is entitled to distributions on such Lien on an equal and ratable basis with the Senior Secured Convertible Note Obligations and Second Lien Credit Agreement Obligations pursuant to the Security Documents or otherwise; provided that the representative of such Senior Second Lien Obligations executes a joinder agreement or amendment to, or amendment and restatement of, the applicable Security Documents and the Intercreditor Agreement, or enters into an additional intercreditor agreement with the Collateral Agent providing that any amounts received in respect of the Collateral in connection with an enforcement of the Liens securing any Second Lien Obligations (or received in respect of such Liens in any bankruptcy or insolvency proceeding) shall, subject to the Intercreditor Agreement and in accordance with Section 5.4 hereof, after payment of all indemnities, compensation and expenses (including the fees and expenses of counsel and experts) payable to the Collateral Agent, the 2010 Trustee, the 2018 Trustee, the Second Lien Credit Agreement Agent and each other trustee or agent for any class of Second Lien Obligations in their capacities as such (which shall be paid first to the Collateral Agent and then among each such trustee or agent on a pro rata basis), be distributed first to each trustee or agent for a class of Senior Second Lien Obligations for distribution to the holders thereof on a pro rata basis based on the amount of outstanding obligations of each such class until all Senior Second Lien Obligations are paid in full and only thereafter to the 2010 Trustee and each other trustee or agent for a class of Junior Second Lien Obligations for distribution to the holders thereof until all Junior Second Lien Obligations are paid in full and thereafter to Holdings. At the Issuer's option (as certified to the Collateral Agent, each Junior Second Lien Agent and each Senior Second Lien Agent pursuant to an Officer's Certificate), any indebtedness secured by a Lien on the Collateral may be Senior Second Lien Obligations. For the avoidance of doubt, any obligations designated as Senior Second Lien Obligations pursuant to Section 7.2, subject to satisfaction of the requirements set forth therein, shall constitute Senior Second Lien Obligations.

"Senior Secured Note Documents" means the Senior Secured Notes, any guarantees thereof, the 2010 Indenture and the Security Documents.

"Senior Secured Note Obligations" means the collective reference to (i) all obligations, liabilities and indebtedness (including, without limitation, principal, premium, interest (including, without limitation, all interest that accrues after the commencement of any case, proceeding or other action relating to the bankruptcy, insolvency, reorganization or similar proceeding of any Grantor at the rate provided for in the respective documentation, whether or not such claim for post-petition interest is allowed in any such proceeding), fees, costs, expenses and indemnities, including the fees and expenses of counsel) owing to the Collateral Agent, the 2010 Trustee and holders of the Senior Secured Notes under the Senior Secured Note Documents and the due performance and compliance by the Grantors with all of the terms, conditions and agreements contained in the Senior Secured Note Documents; (ii) any and all sums advanced by the Collateral Agent in accordance with any of the Senior Secured Note Documents in order to preserve the Collateral or preserve its security interest in the Collateral; and (iii) in the event of any proceedings for the collection or enforcement of any indebtedness, obligations or liabilities of the Grantors referred to in clause (i) above, the reasonable expenses of retaking, holding, preparing for sale or lease, selling or otherwise disposing of or realizing on the Collateral, or of any



exercise by the Collateral Agent of its rights hereunder, together with reasonable attorneys' fees and court costs.

"Senior Secured Convertible Note Documents" means the Senior Secured Convertible Notes, any guarantees thereof, the 2018 Indenture and the Security Documents.

"Senior Secured Convertible Note Obligations" means the collective reference to (i) all obligations, liabilities and indebtedness (including, without limitation, principal, premium, interest (including, without limitation, all interest that accrues after the commencement of any case, proceeding or other action relating to the bankruptcy, insolvency, reorganization or similar proceeding of any Grantor at the rate provided for in the respective documentation, whether or not such claim for post-petition interest is allowed in any such proceeding), fees, costs, expenses and indemnities, including the fees and expenses of counsel) owing to the Collateral Agent, the 2018 Trustee and holders of the Senior Secured Convertible Notes under the Senior Secured Convertible Note Documents and the due performance and compliance by the Grantors with all of the terms, conditions and agreements contained in the Senior Secured Note Convertible Documents; (ii) any and all sums advanced by the Collateral Agent in accordance with any of the Senior Secured Convertible Note Documents in order to preserve the Collateral or preserve its security interest in the Collateral; and (iii) in the event of any proceedings for the collection or enforcement of any indebtedness, obligations or liabilities of the Grantors referred to in clause (i) above, the reasonable expenses of retaking, holding, preparing for sale or lease, selling or otherwise disposing of or realizing on the Collateral, or of any exercise by the Collateral Agent of its rights hereunder, together with reasonable attorneys' fees and court costs.

"Software" means all "software" as such term is defined in the New York UCC used by any Grantor to process, assemble, prepare for sale, market for sale, sell or otherwise dispose of the Collateral, other than software embedded in any category of goods, including all computer programs and all supporting information provided in connection with a transaction related to any program.

"Trademarks" means (i) all trademarks, trade names, corporate names, company names, business names, fictitious business names, trade styles, service marks, logos and other source or business identifiers, and all goodwill associated therewith, now existing or hereafter adopted or acquired, all registrations and recordings thereof, and all applications in connection therewith, whether in the United States Patent and Trademark Office or in any similar office or agency of the United States, any State thereof or any other country or any political subdivision thereof, or otherwise, and all common-law rights related thereto and (ii) the right to obtain all renewals thereof.

"Trademark License" means any agreement, whether written or oral, providing for the grant by or to any Grantor of any right to use any Trademark.

#### 1.2 Other Definitional Provisions.

(a) The words "hereof," "herein," "hereto" and "hereunder" and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement, and Section and Schedule references are to this Agreement unless otherwise specified.

(b) The meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms.

(c) Where the context requires, terms relating to the Collateral or any part thereof, when used in relation to a Grantor, shall refer to such Grantor's Collateral or the relevant part thereof.

1.3 Perfection Certificate. The Collateral Agent, each Grantor and each Secured Party agree that the Perfection Certificate and all descriptions of Collateral therein and schedules, amendments and supplements thereto are and shall at all times remain a part of this Agreement.

## SECTION 2. GRANT OF SECURITY INTEREST

2.1 Collateral; Grant of Security Interest. Each Grantor hereby grants to the Collateral Agent for the equal and ratable benefit of the Secured Parties a security interest in all of the following property now owned, or at any time hereafter acquired, by such Grantor or in which such Grantor now has, or at any time in the future may acquire, any right, title or interest (collectively, the "Collateral"), as collateral security for the prompt and complete payment and performance when due (whether at the stated maturity, by acceleration or otherwise) of such Grantor's Secured Obligations:

- (a) all Credit Card Accounts Receivable;
- (b) all Inventory;
- (c) all Chattel Paper relating to Credit Card Accounts Receivable;
- (d) all Instruments relating to Credit Card Accounts Receivable;
- (e) all Documents relating to any Inventory;
- (f) all books and records pertaining to the Collateral; and
- (g) to the extent not otherwise included, all Proceeds, insurance claims, Supporting Obligations and products of any and all of the foregoing and all collateral security and guarantees given by any Person with respect to any of the foregoing.

2.2 No Assumption of Liability. The security interest in the Collateral granted to the Collateral Agent is granted as security only and shall not subject the Collateral Agent or any other Secured Party to, or in any way alter or modify, any obligation or liability of any Grantor with respect to or arising out of the Collateral. Anything contained herein to the contrary notwithstanding, each Grantor shall remain liable under any contracts and agreements included in the Collateral, to the extent set forth therein, to perform all of its duties and obligations thereunder to the same extent as if this Agreement and the Second Lien Documents had not been executed, the exercise by Collateral Agent of any of its rights hereunder or any of the Second Lien Documents shall not release any Grantor from any of its duties or obligations under the contracts and agreements included in the Collateral, and the Collateral Agent shall not have any obligation or liability under any contracts, licenses, and agreements included in the Collateral by reason of this Agreement or any of the Second Lien Documents, nor shall Collateral Agent be obligated to perform any of the obligations or duties of any Grantor thereunder or to take any action to collect or enforce any claim for payment assigned hereunder.

## SECTION 3. REPRESENTATIONS AND WARRANTIES

Each Grantor represents and warrants to the Collateral Agent and the other Secured Parties that:

3.1 Title; No Other Liens. Except for the security interest granted to the Collateral Agent for the ratable benefit of the Secured Parties pursuant to this Agreement and any other Permitted Lien, such Grantor owns each item of the Collateral free and clear of any and all Liens or claims of others. No

financing statement or other public notice with respect to all or any part of the Collateral is on file or of record in any public office, except (i) such as have been filed in favor of the Collateral Agent for the ratable benefit of the Secured Parties pursuant to this Agreement or (ii) as are permitted by the Second Lien Documents.

3.2 Perfected Liens.

(a) The security interests granted pursuant to this Agreement (a) upon completion of the filings specified on Schedule 2 (which, in the case of all financing statements referred to on said Schedule 2, have been delivered to the Collateral Agent in completed form) will constitute valid perfected security interests in all of the Collateral as to which a Lien can be perfected by filing in favor of the Collateral Agent, for the ratable benefit of the Secured Parties, as collateral security for the Secured Obligations, enforceable in accordance with the terms hereof and (b) are prior to all other Liens on the Collateral in existence on the date hereof other than Permitted Liens having priority over the Liens of the Collateral Agent pursuant to applicable law or the Intercreditor Agreement.

(b) Notwithstanding anything herein to the contrary, prior to the Discharge of First Lien Obligations, the requirements of this Agreement to deliver Collateral and any certificates, instruments or related documents to the Collateral Agent shall be deemed satisfied by delivery of such Collateral and such certificates, instruments or related documents to any First Lien Collateral Agent. The Issuer shall deliver copies of any such certificates, instruments or related documents to the Collateral Agent.

3.3 Jurisdiction of Organization. On the date hereof, such Grantor's jurisdiction of organization and identification number from the jurisdiction of organization (if any) are specified on Schedule 3. Such Grantor has furnished to the Collateral Agent a charter, certificate of incorporation or other formation document and good standing certificate dated as of a date which is recent to the date hereof.

3.4 Credit Card Accounts Receivable.

(a) No amount payable to such Grantor under or in connection with any Credit Card Accounts Receivable is evidenced by any Instrument or Chattel Paper which has not been delivered to the Collateral Agent (or, if prior to the Discharge of First Lien Obligations, to any First Lien Collateral Agent for the benefit of the Collateral Agent).

(b) Except as would not be reasonably expected to result in a material adverse effect on the business or financial condition of the Issuer and its Subsidiaries considered as a whole (a "Material Adverse Effect"), there are no facts, events or occurrences which would impair the validity of any Credit Card Accounts Receivable, or tend to reduce the amount payable thereunder from the face amount of the claim or invoice or statements delivered to the Collateral Agent (or, if prior to the Discharge of First Lien Obligations, to any First Lien Collateral Agent for the benefit of the Collateral Agent) with respect thereto (other than arising in the ordinary course of business).

3.5 Related Intellectual Property. Such Grantor owns or has a license to use all Intellectual Property which is reasonably necessary to sell the Collateral in the ordinary course. Such Grantor shall take all reasonable and necessary steps to maintain and preserve the benefit of each Trademark License, Copyright License and Patent License which relates to Intellectual Property to the extent that the use of such Intellectual Property would be reasonably necessary in connection with the Collateral Agent's enforcement of any of its remedies under the Second Lien Documents.



3.6 Dealer Store Inventory. Except as would not be reasonably expected to result in a Material Adverse Effect, (a) all of the Inventory at each Dealer Store is owned by a Grantor free and clear of any and all Liens or claims of others except for any Permitted Liens, and (b) all such Inventory is subject to a legal, valid and perfected security interest in favor of the applicable Grantor, which is prior to any other Lien on such Inventory.

#### SECTION 4. COVENANTS

Each Grantor covenants and agrees with the Collateral Agent and the other Secured Parties that, until the Final Date:

4.1 Delivery of Instruments and Chattel Paper. If any amount payable under or in connection with any of the Collateral shall be or become evidenced by any Instrument, Chattel Paper or transferable records, such Instrument, Chattel Paper or transferable records, shall be promptly delivered to the Collateral Agent (or, if prior to the Discharge of First Lien Obligations, to any First Lien Collateral Agent for the benefit of the Collateral Agent), duly indorsed in a manner satisfactory to the Collateral Agent (or, if prior to the Discharge of First Lien Obligations, to any First Lien Collateral Agent for the benefit of the Collateral Agent), to be held as Collateral pursuant to this Agreement.

4.2 [Intentionally Omitted].

4.3 Maintenance of Perfected Security Interest; Further Documentation.

(a) Such Grantor shall maintain the security interest created by this Agreement as a perfected security interest having at least the priority described in Section 3.2 and shall defend such security interest against the claims and demands of all Persons whomsoever, subject to the rights of such Grantor under the Security Documents to dispose of the Collateral.

(b) Each Grantor shall file, and if reasonably requested by the Collateral Agent will execute or authenticate and deliver to the Collateral Agent, all financing or continuation statements, or amendments thereto, and such other instruments or notices, as may be necessary, or as the Collateral Agent may reasonably request, from time to time in order to maintain a perfected security interest in the Collateral owned by such Grantor subject only to (i) Liens securing the First Lien Obligations and (ii) any other Permitted Lien. Such financing statements may describe the Collateral in the same manner as described herein or may contain an indication or description of collateral that describes such property in any other manner as is necessary, advisable or prudent to ensure the perfection of the security interest in the Collateral granted to the Collateral Agent herein.

(c) Each Grantor agrees that, in the event any Grantor, pursuant to the First Lien Security Agreement, takes any action to grant or perfect a Lien in favor of any First Lien Collateral Agent in any assets that constitute Collateral (other than Proceeds in the form of cash or cash equivalents) hereunder, such Grantor shall, to the extent reasonable, take a corresponding action to grant or perfect a Lien (subject to the Intercreditor Agreement) in such Collateral in favor of the Collateral Agent to secure the Secured Obligations without the request of the Collateral Agent.

4.4 Changes in Name, etc. Such Grantor will not, except upon 15 days' prior written notice to the Collateral Agent, the filing of all additional financing statements and other documents necessary to maintain the validity, perfection and priority of the security interests provided for herein and other documents necessary or reasonably requested by the Collateral Agent to maintain the validity, perfection and priority of the security interests provided for herein, change its organizational form from that of a

registered entity to an unregistered entity (or from an unregistered entity to a registered entity), change its jurisdiction of organization from that referred to in Section 3.3 or change its name or organizational form.

## SECTION 5. REMEDIAL PROVISIONS

5.1 Certain Matters Relating to Credit Card Accounts Receivable. At the Collateral Agent's request (or, if prior to the Discharge of First Lien Obligations, at the request of any First Lien Collateral Agent for the benefit of the Collateral Agent), at any time after the occurrence and during the continuance of an Event of Default, each Grantor shall deliver to the Collateral Agent (or, if prior to the Discharge of First Lien Obligations, to any First Lien Collateral Agent for the benefit of the Collateral Agent) all original and other documents evidencing, and relating to, the agreements and transactions which gave rise to the Credit Card Accounts Receivable.

### 5.2 Communications with Obligor; Grantors Remain Liable.

(a) The Collateral Agent (or, if prior to the Discharge of First Lien Obligations, any First Lien Collateral Agent for the benefit of the Collateral Agent) in its own name or in the name of others may at any time after the occurrence and during the continuance of an Event of Default communicate with obligors under the Credit Card Accounts Receivable to verify with them to the satisfaction of the Collateral Agent the existence, amount and terms of any Credit Card Accounts Receivable.

(b) Upon the request of the Collateral Agent after the Discharge of First Lien Obligations, at any time after the occurrence and during the continuance of an Event of Default, each Grantor shall notify obligors on the Credit Card Accounts Receivable that the Credit Card Accounts Receivable have been assigned to the Collateral Agent for the benefit of the Secured Parties and that payments in respect thereof shall be made directly to the Collateral Agent.

(c) Anything herein to the contrary notwithstanding, each Grantor shall remain liable under each of the Credit Card Accounts Receivable to observe and perform all the conditions and obligations to be observed and performed by it thereunder, all in accordance with the terms of any agreement giving rise thereto. Neither the Collateral Agent nor any other Secured Party shall have any obligation or liability under any Credit Card Accounts Receivable (or any agreement giving rise thereto) by reason of or arising out of this Agreement or the receipt by the Collateral Agent or any other Secured Party of any payment relating thereto, nor shall the Collateral Agent or any other Secured Party be obligated in any manner to perform any of the obligations of any Grantor under or pursuant to any Credit Card Accounts Receivable (or any agreement giving rise thereto), to make any payment, to make any inquiry as to the nature or the sufficiency of any payment received by it or as to the sufficiency of any performance by any party thereunder, to present or file any claim, to take any action to enforce any performance or to collect the payment of any amounts which may have been assigned to it or to which it may be entitled at any time or times.

### 5.3 [Intentionally Omitted].

5.4 Application of Proceeds. Subject to the terms of the Intercreditor Agreement, any proceeds received by the Collateral Agent in respect of any sale of, collection from or other realization upon all or any part of the Collateral pursuant to the exercise by the Collateral Agent of its remedies, or received by the Collateral Agent in respect of all or any part of the Collateral in connection with any bankruptcy, insolvency, reorganization or similar proceeding of any Grantor, shall be applied, together with any other sums then held by the Collateral Agent pursuant to this Agreement, as follows:

First, to pay all indemnities, compensation and expenses (including the fees and expenses of counsel and experts) owing to the Collateral Agent in its capacity as such in accordance with the terms of this Agreement and the other Second Lien Documents;

Second, to the 2010 Trustee in its capacity as such in accordance with the terms of the 2010 Indenture, to the Second Lien Credit Agreement Agent in its capacity as such in accordance with the terms of the Second Lien Credit Agreement, to the 2018 Trustee in its capacity as such in accordance with the terms of the 2018 Indenture and to any other Junior Second Lien Agent or Senior Second Lien Agent in its capacity as such in accordance with the terms of the applicable Junior Second Lien Agreement or Senior Second Lien Agreement, in each case ratably;

Third, to ratably pay all amounts owing to holders of Senior Second Lien Obligations (including interest, costs and attorneys' fees owed to the holders of Senior Second Lien Obligations, whether or not a claim is allowed against the Issuer or any Grantor for such interest, fees, indemnification payments, expense reimbursements and other amounts in any related bankruptcy proceeding) in accordance with the terms of the 2018 Indenture, the Second Lien Credit Agreement and any other Senior Second Lien Agreements;

Fourth, to ratably pay all amounts owing to holders of Junior Second Lien Obligations (including interest, costs and attorneys' fees owed to the holders of Junior Second Lien Obligations, whether or not a claim is allowed against the Issuer or any Grantor for such interest, fees, indemnification payments, expense reimbursements and other amounts in any related bankruptcy proceeding) in accordance with the terms of the 2010 Indenture and any other Junior Second Lien Agreements; and

Fifth, to pay the Issuer or to whomsoever may be lawfully entitled to receive the same.

All applications of proceeds pursuant to clause First above, clause Second above, clause Third above and clause Fourth above, respectively, shall be allocated among the applicable Secured Parties on a *pro rata* basis according to the principal, interest and/or other amounts owing in respect of the applicable Secured Obligations owing to such Secured Parties at the time of the distribution. In the event that any such proceeds are insufficient to pay in full the items described in clauses First through Fourth of this Section 5.4, the Grantors shall remain liable, jointly and severally, for any deficiency.

If, despite the provisions of this Agreement, any Secured Party shall receive any payment or other recovery in excess of its portion of payments on account of the Secured Obligations to which it is then entitled in accordance with this Agreement, such Secured Party shall hold such payment or recovery in trust for the benefit of all Secured Parties for distribution in accordance with this Section 5.4.

Upon the request of the Collateral Agent prior to any distribution under this Section 5.4, each Secured Party shall provide to the Collateral Agent certificates, in form and substance reasonably satisfactory to the Collateral Agent, setting forth the respective amounts referred to in Section 5.4, that each such Secured Party believes it is entitled to receive, and the Collateral Agent shall be fully entitled to rely on such certificates.

#### 5.5 Code and Other Remedies.

(a) If an Event of Default shall occur and be continuing, the Collateral Agent, on behalf of the Secured Parties, may (and at the direction of the Required Secured Parties shall (subject to any right of the Collateral Agent to require indemnity from such persons prior to taking any enforcement action)) exercise, in addition to all other rights and remedies granted to them in this Agreement and in any other



instrument or agreement securing, evidencing or relating to the Secured Obligations, all rights and remedies of a secured party under the New York UCC or any other applicable law. Without limiting the generality of the foregoing, the Collateral Agent, without demand of performance or other demand, presentment, protest, advertisement or notice of any kind (except any notice required by law referred to below) to or upon any Grantor or any other Person (all and each of which demands, defenses, advertisements and notices are hereby waived), may (and at the direction of the Required Secured Parties shall (subject to any right of the Collateral Agent to require indemnity from such persons prior to taking any enforcement action)) in such circumstances forthwith collect, receive, appropriate and realize upon the Collateral, or any part thereof, and/or may forthwith sell, lease, assign, give option or options to purchase, or otherwise dispose of and deliver the Collateral or any part thereof (or contract to do any of the foregoing), in one or more parcels at public or private sale or sales, at any exchange, broker's board or office of the Collateral Agent or elsewhere upon such terms and conditions as it may deem advisable and at such prices as it may deem best, for cash or on credit or for future delivery without assumption of any credit risk. Each purchaser at any such sale shall hold the property sold absolutely, free from any claim or right on the part of any Grantor. The Collateral Agent shall have the right upon any such public sale or sales, and, to the extent permitted by law, upon any such private sale or sales, to purchase the whole or any part of the Collateral so sold, free of any right or equity of redemption, stay, valuation or appraisal on the part of any Grantor, which right or equity is hereby waived and released, and may credit against the purchase price the amount of any claim then due and payable from any Grantor on account of the Secured Obligations owed to the Collateral Agent, and the Collateral Agent may, upon compliance with the terms of sale, hold, retain and dispose of such property without further accountability to any Grantor therefor. Each Grantor further agrees, at the Collateral Agent's request, to assemble the Collateral and make it available to the Collateral Agent at the Grantor's sole risk and expense, at places which the Collateral Agent shall reasonably select, whether at such Grantor's premises or elsewhere. The Collateral Agent shall apply the net proceeds of any action taken by it pursuant to this Section 5.5, after deducting all reasonable costs and expenses of every kind incurred in connection therewith or incidental to the care or safekeeping of any of the Collateral or in any way relating to the Collateral or the rights of the Collateral Agent hereunder, including, without limitation, reasonable attorneys' fees and disbursements, to the payment in whole or in part of the Secured Obligations, in the order set forth in Section 5.4, and only after such application and after the payment by the Collateral Agent of any other amount required by any provision of law, including, without limitation, Section 9-615(a)(3) of the New York UCC, need the Collateral Agent account for the surplus, if any, to any Grantor. To the extent permitted by applicable law, each Grantor waives all claims, damages and demands it may acquire against any Collateral Agent arising out of the exercise by them of any rights hereunder. If any notice of a proposed sale or other disposition of Collateral shall be required by law, such notice shall be deemed reasonable and proper if given at least 10 days before such sale or other disposition. The Collateral Agent shall not be obligated to make any sale or other disposition of any Collateral if it shall determine not to do so, regardless of the fact that notice of sale or other disposition of such Collateral shall have been given. The Collateral Agent may, without notice or publication, adjourn any public or private sale or cause the same to be adjourned from time to time by announcement at the time and place fixed for sale, and such sale may, without further notice, be made at the time and place to which the same was so adjourned. Any public sale shall be held at such time or times within ordinary business hours and at such place or places as the Collateral Agent may fix and state in the notice of such sale. If any of the Collateral is sold, leased, or otherwise disposed of by the Collateral Agent on credit, the Secured Obligations shall not be deemed to have been reduced as a result thereof unless and until payment is finally received thereon by the Collateral Agent.

(b) If an Event of Default shall occur and be continuing, with respect to any Collateral consisting of Inventory, the Collateral Agent may conduct one or more going out of business sales, in the Collateral Agent's own right or by one or more agents and contractors. Such sale(s) may be conducted upon any premises owned, leased, or occupied by any Grantor. The Collateral Agent and any such agent or contractor, in conjunction with any such sale, may augment the Inventory with other goods (all of

which other goods shall remain the sole property of the Collateral Agent or such agent or contractor). Any amounts realized from the sale of such goods which constitute augmentations to the Inventory (net of an allocable share of the costs and expenses incurred in their disposition) shall be the sole property of the Collateral Agent or such agent or contractor and neither any Grantor nor any Person claiming under or in right of any Grantor shall have any interest therein. Each purchaser at any such going out of business sale shall hold the property sold absolutely, free from any claim or right on the part of any Grantor.

(c) If an Event of Default shall occur and be continuing, with respect to any Collateral consisting of Accounts, the Collateral Agent may: (i) demand, collect and receive any amounts relating thereto, as the Collateral Agent may reasonably determine; (ii) commence and prosecute any actions in any court for the purposes of collecting any such Accounts and enforcing any other rights in respect thereof; (iii) defend, settle or compromise any action brought and, in connection therewith, give such discharges or releases as the Collateral Agent may reasonably deem appropriate; (iv) without limiting the Collateral Agent's rights set forth in Section 6.1, receive, open and dispose of mail addressed to any Grantor and endorse checks, notes, drafts, acceptances, money orders, bills of lading, warehouse receipts or other instruments or documents evidencing payment, shipment or storage of the goods giving rise to such Accounts or securing or relating to such Accounts, on behalf of and in the name of such Grantor; and (v) sell, assign, transfer, make any agreement in respect of, or otherwise deal with or exercise rights in respect of, any such Accounts or the goods or services which have given rise thereto, as fully and completely as though the Collateral Agent was the absolute owner thereof for all purposes.

(d) If an Event of Default shall occur and be continuing, with or without legal process and with or without prior notice or demand for performance, the Collateral Agent may enter upon, occupy, and use any premises owned or occupied by each Grantor. The Collateral Agent shall not be required to remove any of the Collateral from any such premises upon taking possession thereof, and may render any Collateral unusable to the Grantors. In no event shall the Collateral Agent be liable to any Grantor for use or occupancy by the Collateral Agent of any premises pursuant to this Section 5.5, nor for any charge (such as wages for the Grantors' employees and utilities) reasonably incurred in connection with the Collateral Agent's exercise of its rights and remedies hereunder.

(e) For purposes of this Section 5.5, a written and fully executed agreement to purchase the Collateral or any portion thereof shall be treated as a sale thereof. The Collateral Agent shall be free to carry out such sale pursuant to such agreement and no Grantor shall be entitled to the return of the Collateral or any portion thereof subject thereto, notwithstanding the fact that after the Collateral Agent shall have entered into such an agreement all Events of Default shall have been remedied and the Secured Obligations paid in full.

(f) To the extent permitted by applicable law, each Grantor hereby waives all rights of redemption, stay, valuation and appraisal which such Grantor now has or may at any time in the future have under any rule of law or statute now existing or hereafter enacted. The Collateral Agent shall have no obligation to marshal any of the Collateral or resort to any of the property or assets of any Grantor in any particular manner or order.

5.6 Deficiency. Each Grantor shall remain liable for any deficiency if the proceeds of any sale or other disposition of the Collateral are insufficient to pay its Secured Obligations and the fees and disbursements of any attorneys employed by the Collateral Agent or any other Secured Party to collect such deficiency.

5.7 Grant of License in Intellectual Property, Software and other Assets.

(a) For the purpose of enabling the Collateral Agent to exercise the rights and remedies under this Section 5 at such time as the Collateral Agent shall be lawfully entitled to exercise such rights and remedies, and for no other purpose, each Grantor hereby (i) assigns and transfers to the Collateral Agent and grants the Collateral Agent, for the benefit of the Collateral Agent and the other Secured Parties, an irrevocable, nonexclusive license (exercisable without payment of royalty or any other compensation to such Grantor or any Affiliate of such Grantor) to use, license or sublicense, any related Intellectual Property now owned or licensed or hereafter owned, licensed or otherwise acquired by such Grantor, and wherever the same may be located, and including in such license access to all media in which any of the licensed items may be recorded or stored and to all computer software and programs used for the compilation or printout thereof and (ii) irrevocably agrees that the Collateral Agent may sell any of such Grantor's Inventory directly to any Person, including, without limitation, Persons who have previously purchased such Grantor's Inventory from such Grantor and in connection with any such sale or other enforcement of the Collateral Agent's rights under this Agreement, may sell Inventory which bears any Trademark owned by or licensed to such Grantor and any Inventory that is covered by any Copyright owned by or licensed to such Grantor and the Collateral Agent may finish any work in process and affix any Trademark owned by or licensed to such Grantor and sell such Inventory as provided herein; provided that, notwithstanding the foregoing, except as provided in any agreement between the Collateral Agent and the owner or licensor of such Intellectual Property, this Agreement shall not constitute a license to use, license or sublicense, any Intellectual Property to the extent such license or sublicense is prohibited by or results in the termination of or requires any consent not obtained under, any contract, license, agreement, instrument or other document evidencing or giving rise to such Intellectual Property, except to the extent that (x) the term in such contract, license, agreement, instrument or other document providing for such prohibition, breach, default or termination or requiring such consent is ineffective under applicable law, or (y) the contract, license, agreement, instrument or other document pursuant to which such Grantor was granted its rights to any such Intellectual Property was issued by a Subsidiary or Affiliate of such Grantor (and is not subject to an applicable constraint in an over-license or other agreement with a third party).

(b) For the purpose of enabling the Collateral Agent to exercise the rights and remedies under this Section 5 at such time as the Collateral Agent shall be lawfully entitled to exercise such rights and remedies, and for no other purpose, each Grantor hereby assigns and transfers to the Collateral Agent and grants to the Collateral Agent, for the benefit of the Collateral Agent and the other Secured Parties, an irrevocable, nonexclusive license (exercisable without payment of royalty or any other compensation to such Grantor or any other Person) to use, license or sublicense, any Software now owned or licensed or hereafter owned, licensed or otherwise acquired by such Grantor; provided that, notwithstanding the foregoing, except as provided in any agreement between the Collateral Agent and the owner or licensor of such Software, this Agreement shall not constitute a license to use, license or sublicense, any Software to the extent such license or sublicense is prohibited by or results in the termination of or requires any consent not obtained under, any contract, license, agreement, instrument or other document evidencing or giving rise to such Software, except to the extent that (i) the term in such contract, license, agreement, instrument or other document providing for such prohibition, breach, default or termination or requiring such consent is ineffective under applicable law, or (ii) the contract, license, agreement, instrument or other document pursuant to which such Grantor was granted its rights to any such Software was issued by a Subsidiary or Affiliate of such Grantor (and is not subject to an applicable constraint in an over-license or other agreement with a third party).

(c) Without duplication of the rights granted to the Collateral Agent in clauses (a) and (b) of this Section 5.7, and for the purpose of enabling the Collateral Agent to exercise the rights and remedies under this Section 5 at such time as the Collateral Agent shall be lawfully entitled to exercise such rights and remedies, and for no other purpose, each Grantor hereby assigns and transfers to the Collateral Agent and grants to the Collateral Agent, for the benefit of the Collateral Agent and the other Secured Parties, an



irrevocable, nonexclusive license (exercisable without payment of royalty, rent or any other compensation to such Grantor or any other Person), to use, license or sublicense, any real property or personal property of such Grantor which does not constitute Collateral, including but not limited to, all Equipment, Fixtures, General Intangibles and Goods, whether now or hereafter owned, leased or occupied by such Grantor; provided that, notwithstanding the foregoing, except as provided in any agreement between the Collateral Agent and the owner or licensor of such real or personal property, this Agreement shall not constitute a license to use, license or sublicense, any real or personal property to the extent such license or sublicense is prohibited by or results in the termination of or requires any consent not obtained under, any lease, contract, license, agreement, instrument or other document evidencing or giving rise to such property or any rights therein, except to the extent that (i) the term in such lease, contract, license, agreement, instrument or other document providing for such prohibition, breach, default or termination or requiring such consent is ineffective under applicable law, or (ii) the contract, license, agreement, instrument or other document pursuant to which such Grantor was granted its rights to any such real property or personal property was issued by a Subsidiary or Affiliate of such Grantor (and is not subject to an applicable constraint in an over-license or other agreement with a third party).

#### SECTION 6. THE COLLATERAL AGENT

##### 6.1 Collateral Agent's Appointment as Attorney-in-Fact, etc.

(a) Each Grantor hereby irrevocably constitutes and appoints the Collateral Agent and any officer or agent thereof, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of such Grantor and in the name of such Grantor or in its own name, for the purpose of carrying out the terms of this Agreement, to take any and all appropriate action and to execute any and all documents and instruments which may be necessary or desirable to accomplish the purposes of this Agreement, and, without limiting the generality of the foregoing, each Grantor hereby gives the Collateral Agent the power and right, on behalf of such Grantor, without notice to, or assent by such Grantor, to do any or all of the following:

(i) in the name of such Grantor or its own name, or otherwise, take possession of and indorse and collect any checks, drafts, notes, acceptances or other instruments for the payment of moneys due under any Credit Card Accounts Receivable or with respect to any other Collateral and file any claim or take any other action or proceeding in any court of law or equity or otherwise deemed appropriate by the Collateral Agent for the purpose of collecting any and all such moneys due under any Credit Card Accounts Receivable or with respect to any other Collateral whenever payable;

(ii) pay or discharge taxes and Liens levied or placed on or threatened against the Collateral, effect any repairs or any insurance called for by the terms of this Agreement and pay all or any part of the premiums therefor and the costs thereof;

(iii) execute, in connection with any sale provided for in Section 5.5, any indorsements, assignments or other instruments of conveyance or transfer with respect to the Collateral; and

(iv) (1) direct any party liable for any payment under any of the Collateral to make payment of any and all moneys due or to become due thereunder as the Collateral Agent shall direct; (2) ask or demand for, collect, and receive payment of and receipt for, any and all moneys, claims and other amounts due or to become due at any time in respect of or arising out of any Collateral; (3) sign and indorse any invoices, freight or express bills, bills of lading, storage or warehouse receipts, drafts against debtors, assignments, verifications, notices and other

documents in connection with any of the Collateral; (4) commence and prosecute any suits, actions or proceedings at law or in equity in any court of competent jurisdiction to collect the Collateral or any portion thereof and to enforce any other right in respect of any Collateral; (5) defend any suit, action or proceeding brought against such Grantor with respect to any Collateral; (6) settle, compromise or adjust any such suit, action or proceeding and, in connection therewith, give such discharges or releases as the Collateral Agent may deem appropriate; and (7) generally, sell, transfer, pledge and make any agreement with respect to or otherwise deal with any of the Collateral as fully and completely as though the Collateral Agent was the absolute owner thereof for all purposes, and do, at the Collateral Agent's option and such Grantor's expense, at any time, or from time to time, all acts and things which the Collateral Agent deems necessary to protect, preserve or realize upon the Collateral and the Collateral Agent's and any other Secured Party's security interest therein and to effect the intent of this Agreement, all as fully and effectively as such Grantor might do.

Anything in this Section 6.1(a) to the contrary notwithstanding, the Collateral Agent agrees that it will not exercise any rights under the power of attorney provided for in this Section 6.1(a) unless an Event of Default shall have occurred and be continuing.

(b) Without limitation to the Collateral Agent's or any other Secured Party's rights to payment, reimbursement or indemnification under any other Security Document, the expenses of the Collateral Agent incurred in connection with actions undertaken as provided in Sections 6.1 and 7.6 shall be payable by any applicable Grantor to the Collateral Agent on demand.

(c) Each Grantor hereby ratifies all that said attorneys shall lawfully do or cause to be done by virtue hereof. All powers, authorizations and agencies contained in this Agreement are coupled with an interest and are irrevocable until this Agreement is terminated and the security interests created hereby are released.

**6.2 Duty of Collateral Agent.** The applicable provisions of the Second Lien Documents are herein incorporated by reference and shall be applicable to the rights, obligations, privileges, protections, immunities and benefits given to the Collateral Agent hereunder, including without limitation its right to be compensated, reimbursed, and indemnified, and are extended to, and shall be enforceable by, each agent, custodian and other person employed to act on behalf of the Collateral Agent hereunder. The Collateral Agent's sole duty with respect to the custody, safekeeping and physical preservation of the Collateral in its possession, under Section 9-207 of the New York UCC or otherwise, shall be to deal with it in the same manner as the Collateral Agent deals with similar property for its own account. The Collateral Agent will not be responsible for filing any financing or continuation statements or recording any documents or instruments in any public office at any time or times or otherwise perfecting or maintaining the perfection of any Liens on the Collateral. Neither the Collateral Agent nor any other Secured Party nor any of their respective officers, directors, employees or agents shall be liable for failure to demand, collect or realize upon any of the Collateral or for any delay in doing so or shall be under any obligation to sell or otherwise dispose of any Collateral upon the request of any Grantor or any other Person or to take any other action whatsoever with regard to the Collateral or any part thereof. The powers conferred on the Collateral Agent and the other Secured Parties hereunder are solely to protect the Collateral Agent's and the other Secured Parties' interests in the Collateral and shall not impose any duty upon the Collateral Agent or any other Secured Party to exercise any such powers. The Collateral Agent and the other Secured Parties shall be accountable only for amounts that they actually receive as a result of the exercise of such powers, and neither they nor any of their officers, directors, employees or agents shall be responsible to any Grantor for any act or failure to act hereunder, except for their own gross negligence or willful misconduct, as determined by a final and non-appellable judgment of a court of competent jurisdiction. In furtherance and not in limitation of

the foregoing, Wilmington Trust, National Association hereby agrees to act as Collateral Agent under and as defined in the 2018 Indenture upon and in accordance with the express terms and conditions contained therein and the other Senior Secured Convertible Note Documents, as applicable.

6.3 Execution of Financing Statements. Each Grantor authorizes the Collateral Agent to file or record financing statements and other filing or recording documents or instruments with respect to the Collateral without the signature of such Grantor in such form and in such offices as the Collateral Agent determines appropriate to perfect the security interests of the Collateral Agent under this Agreement.

6.4 Authority of the Collateral Agent. Each Grantor acknowledges that the rights and responsibilities of the Collateral Agent under this Agreement with respect to any action taken by the Collateral Agent or the exercise or non-exercise by the Collateral Agent of any request, judgment or other right or remedy provided for herein or resulting or arising out of this Agreement shall, as between the Collateral Agent and the other Secured Parties, be governed by the Second Lien Documents and by such other agreements with respect thereto as may exist from time to time among them, but, as between the Collateral Agent and the Grantors, the Collateral Agent shall be conclusively presumed to be acting as agent for the Secured Parties with full and valid authority so to act or refrain from acting, and no Grantor shall be under any obligation, or entitlement, to make any inquiry respecting such authority.

6.5 Second Lien Obligations. The Collateral Agent shall be permitted to rely on any certificate, direction or consent delivered by any agent with respect to any series of Secured Obligations under any Second Lien Documents with respect to all matters relating to the relevant Secured Obligations.

#### SECTION 7. MISCELLANEOUS

7.1 Intercreditor Agreement. Notwithstanding anything herein to the contrary, the Liens and security interests granted to the Collateral Agent pursuant to this Agreement and the exercise of any right or remedy by the Collateral Agent hereunder, in each case, with respect to the Collateral are subject to the limitations and provisions of the Intercreditor Agreement. In the event of any conflict between the terms of the Intercreditor Agreement and the terms of this Agreement, the terms of the Intercreditor Agreement shall govern and control. By its execution and delivery of this Agreement, each Junior Second Lien Agent and Senior Second Lien Agent authorizes and directs the Collateral Agent to execute and deliver the Intercreditor Agreement and perform its obligations thereunder, binding such Junior Second Lien Agent and Senior Second Lien Agents and their respective Secured Parties to the terms thereof.

7.2 Second Lien Obligations. On or after the date hereof and so long as not prohibited by the Second Lien Documents with respect to each series of Secured Obligations, the Issuer may from time to time designate any indenture, credit agreement or other contract to be a Junior Second Lien Agreement or Senior Second Lien Agreement and the indebtedness and other obligations thereunder to be secured as Junior Second Lien Obligations or Senior Second Lien Obligations, as applicable, by delivering to the Collateral Agent, each Junior Second Lien Agent and each Senior Second Lien Agent, if any, (a) a certificate signed by an Officer of the Issuer (i) identifying the obligations so designated and the initial aggregate principal amount or face amount thereof, (ii) stating that such agreement is designated as a Junior Second Lien Agreement or Senior Second Lien Agreement, as applicable, and such obligations are designated as (A) Secured Obligations and (B) Junior Second Lien Obligations or Senior Second Lien Obligations, as applicable, for purposes hereof, (iii) representing that such designation of such obligations as Secured Obligations and Junior Second Lien Obligations or Senior Second Lien Obligations, as applicable, complies with the terms of the Second Lien Documents with respect to each series of Secured Obligations and (iv) specifying the name and address of the Junior Second Lien Agent or Senior Second Lien Agent, as applicable, for such obligations and (b) a fully executed Junior Second Lien Joinder Agreement or Senior Second Lien Joinder Agreement, as applicable. Each Junior Second Lien

Agent and Senior Second Lien Agent that becomes party hereto pursuant to a Junior Second Lien Joinder Agreement or Senior Second Lien Joinder Agreement agrees that upon the satisfaction of all conditions set forth in the preceding sentence, the Collateral Agent shall act as agent under this Agreement for such Junior Second Lien Agent or Senior Second Lien Agent and the holders of such Junior Second Lien Obligations or Senior Second Lien Obligations, and as Collateral Agent for the benefit of all Secured Parties, including without limitation, any Secured Party that holds any such Junior Second Lien Obligations or Senior Second Lien Obligations, and each such Junior Second Lien Agent or Senior Second Lien Agent, for itself and the other holders of the applicable Junior Second Lien Obligations or Senior Second Lien Obligations, agrees to the appointment, and acceptance of the appointment, of the Collateral Agent as agent for such Junior Second Lien Agent or Senior Second Lien Agent and the holders of such Junior Second Lien Obligations or Senior Second Lien Obligations, as set forth in each Junior Second Lien Joinder Agreement and Senior Second Lien Joinder Agreement and agrees, on behalf of itself and each Secured Party it represents, to be bound by this Agreement and to be subject to, and, if requested, to become a party to, the Intercreditor Agreement. Notwithstanding the foregoing, it is understood that the Issuer shall not designate, or re-designate, any Senior Second Lien Agreement existing on the date hereof as a Junior Second Lien Agreement (and any related Senior Second Lien Obligations as Junior Second Lien Obligations) without the consent of the applicable Senior Second Lien Agent.

7.3 Amendments in Writing. None of the terms or provisions of this Agreement may be waived, amended, supplemented or otherwise modified except in accordance with the provisions of each Junior Second Lien Agreement and Senior Second Lien Agreement.

7.4 Notices. All notices, requests and demands to or upon the Collateral Agent or any Grantor hereunder shall be given in writing and delivered in person, sent by telecopy, delivered electronically, delivered by commercial courier service or mailed by first-class mail, postage prepaid, addressed as follows:

To the Collateral Agent:

Wilmington Trust, National Association, as Collateral Agent  
Global Capital Markets  
50 South Sixth Street, Suite 1290  
Minneapolis, MN 55402  
Attn: Sears Holdings Corporation Administrator

To any Grantor:

Sears Holdings Corporation  
3333 Beverly Road  
Hoffman Estates, Illinois 60179  
Facsimile: (847) 286-2055  
Attention: Treasurer

With a copy to (which shall not constitute notice):

Wachtell Lipton Rosen & Katz  
51 West 52nd Street  
New York, New York 10019  
Facsimile: (212) 403-2000  
Attention: Joshua A. Feltman



Any such notice, request or demand to or upon any Junior Second Lien Agent or Senior Second Lien Agent shall be addressed to such Junior Second Lien Agent or Senior Second Lien Agent at its notice address set forth in the applicable Second Lien Document.

7.5 No Waiver by Course of Conduct; Cumulative Remedies. Neither the Collateral Agent nor any other Secured Party shall by any act (except by a written instrument pursuant to Section 7.1), delay, indulgence, omission or otherwise be deemed to have waived any right or remedy hereunder or to have acquiesced in any Event of Default. No failure to exercise, nor any delay in exercising, on the part of the Collateral Agent or any other Secured Party, any right, power or privilege hereunder shall operate as a waiver thereof. No single or partial exercise of any right, power or privilege hereunder shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. A waiver by the Collateral Agent or any other Secured Party of any right or remedy hereunder on any one occasion shall not be construed as a bar to any right or remedy which the Collateral Agent or such other Secured Party would otherwise have on any future occasion. The rights and remedies herein provided are cumulative, may be exercised singly or concurrently and are not exclusive of any other rights or remedies provided by law.

7.6 Enforcement Expenses; Indemnification. Without limitation to the Collateral Agent's or any other Secured Party's rights to payment, compensation, reimbursement or indemnification under any other Security Document:

(a) each Grantor jointly and severally agrees to pay or reimburse the Collateral Agent and the other Secured Parties for all their costs and expenses incurred in collecting against any Grantor under this Agreement or otherwise enforcing or preserving any rights under this Agreement and the other Security Documents, including, without limitation, the fees and disbursements of the Secured Parties' counsel in accordance with the terms of the Second Lien Documents;

(b) each Grantor agrees to pay, and to save the Collateral Agent and the other Secured Parties harmless from, any and all liabilities with respect to, or resulting from any delay in paying, any and all stamp, excise, sales or other taxes which may be payable or determined to be payable with respect to any of the Collateral or in connection with any of the transactions contemplated by this Agreement and the other Security Documents;

(c) each Grantor agrees to pay, and to save the Collateral Agent and the other Secured Parties harmless from, any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever with respect to the execution, delivery, enforcement, performance and administration of this Agreement and the other Security Documents other than such as arise from the gross negligence or willful misconduct of such Person; and

(d) to the fullest extent permitted by applicable Law, no Grantor shall assert, and each Grantor hereby waives, any claim against the Collateral Agent and the other Secured Parties, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, this Agreement, any other Security Document or any agreement or instrument contemplated hereby, or the transactions contemplated hereby or thereby. Neither the Collateral Agent nor any other Secured Party shall be liable for any damages arising from the use by unintended recipients of any information or other materials distributed to such unintended recipients by the Collateral Agent or other Secured Party through telecommunications, electronic or other information transmission systems in connection with this Agreement or the other Security Documents or the transactions contemplated hereby or thereby other than for direct or actual damages resulting from the gross negligence or willful misconduct of the Collateral Agent or other Secured Party as determined by a final and non-appealable judgment of a court of competent jurisdiction.

The agreements in this Section 7.6 shall survive repayment of the Secured Obligations and all other amounts payable under the Security Documents and the other Second Lien Documents, the replacement of the Collateral Agent, the release of the Collateral from the Liens created hereby and the termination of this Agreement.

7.7 Successors and Assigns. This Agreement shall be binding upon the successors and assigns of each Grantor and shall inure to the benefit of the Collateral Agent and the other Secured Parties and their successors and assigns; provided that no Grantor may assign, transfer or delegate any of its rights or obligations under this Agreement except as permitted by each of the Second Lien Documents.

7.8 [Intentionally Omitted].

7.9 Counterparts. This Agreement may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of a signature page to this Agreement by facsimile or by electronic mail of a "PDF" file shall be effective as delivery of a manually executed counterpart of this Agreement.

7.10 Severability. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

7.11 Section Headings. The Section headings used in this Agreement are for convenience of reference only and are not to affect the construction hereof or be taken into consideration in the interpretation hereof.

7.12 Integration. This Agreement and the other Security Documents represent the agreement of the Grantors, the Collateral Agent and the other Secured Parties with respect to the subject matter hereof and thereof, and there are no promises, undertakings, representations or warranties by the Collateral Agent or the other Secured Parties relative to subject matter hereof and thereof not expressly set forth or referred to herein or in the other Security Documents.

7.13 GOVERNING LAW. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, BUT WITHOUT GIVING EFFECT TO APPLICABLE PRINCIPLES OF CONFLICTS OF LAW TO THE EXTENT THAT THE APPLICATION OF THE LAW OF ANOTHER JURISDICTION WOULD BE REQUIRED THEREBY.

7.14 Acknowledgements. Each Grantor hereby acknowledges that:

(a) it has been advised by counsel in the negotiation, execution and delivery of this Agreement and the other Security Documents to which it is a party;

(b) neither the Collateral Agent nor any other Secured Party has any fiduciary relationship with or duty to any Grantor arising out of or in connection with this Agreement or any of the other Security Document, and the relationship between the Grantors, on the one hand, and the Collateral Agent and the other Secured Parties, on the other hand, in connection herewith or therewith is solely that of debtor and creditor; and



(c) no joint venture is created hereby or by the other Security Documents or otherwise exists by virtue of the transactions contemplated hereby among the Secured Parties or among the Grantors and the Secured Parties.

7.15 Additional Grantors. Each Subsidiary of the Issuer that is required to become a party to this Agreement pursuant to Section 4.06 of the 2018 Indenture or pursuant to any other Second Lien Document shall become a Grantor for all purposes of this Agreement upon execution and delivery by such Subsidiary of an Assumption Agreement in the form of Exhibit II hereto to the Collateral Agent.

7.16 Releases. This Agreement shall remain in full force and effect and be binding in accordance with and to the extent of its terms upon each Grantor and the successors and assigns thereof and shall inure to the benefit of the Collateral Agent and the other Secured Parties and their respective successors, indorsees, transferees and assigns until the Final Date. In addition, the security interests granted hereunder shall terminate and be released, in whole or in part, (i) as to the obligations under the 2010 Indenture and the Senior Secured Notes, as provided in the 2010 Indenture, (ii) as to the obligations under the Second Lien Credit Agreement, as provided in the Second Lien Credit Agreement, (iii) as to the obligations under the 2018 Indenture and the Senior Secured Convertible Notes, as provided in the 2018 Indenture and (iv) as to any other Junior Second Lien Obligations or Senior Second Lien Obligations that may become Secured Obligations, as provided in the applicable Junior Second Lien Agreement or Senior Second Lien Agreement; provided, however, that this Agreement and the security interest granted herein shall be reinstated if at any time payment, or any part thereof, of any Obligation is rescinded or must otherwise be restored by any Secured Party upon the bankruptcy or reorganization of the Issuer or other Grantor. At the request and sole expense of any Grantor following any such termination, the Collateral Agent shall deliver to such Grantor any Collateral held by the Collateral Agent hereunder, and execute and deliver to such Grantor such documents as such Grantor shall reasonably request to evidence such termination.

7.17 Jurisdiction, Etc.

(a) Each of the parties hereto hereby irrevocably and unconditionally submits, for itself and its property, to the exclusive jurisdiction of any New York State court or federal court of the United States of America sitting in New York City, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement or the other Security Documents, or for recognition or enforcement of any judgment, and each of the parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in any such New York State court or, to the extent permitted by law, in such federal court. Each Grantor hereby irrevocably consents to the service of process in any action or proceeding in such courts by the mailing thereof by any parties hereto by registered or certified mail, postage prepaid, to the Issuer at its address specified pursuant to Section 13.02 of the 2018 Indenture. Each of the parties hereto agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. Nothing in this Agreement shall affect any right that any party may otherwise have to bring any action or proceeding relating to this Agreement or the other Security Documents in the courts of any jurisdiction.

(b) Each of the parties hereto irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection that it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement or the other Security Documents in any New York State or federal court. Each of the parties hereto hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

7.18 WAIVER OF JURY TRIAL. EACH GRANTOR AND THE COLLATERAL AGENT HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVE ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE OTHER SECURITY DOCUMENTS OR THE ACTIONS OF THE COLLATERAL AGENT OR ANY OTHER SECURED PARTY IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT THEREOF.

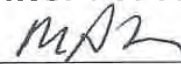
7.19 The 2010 Trustee is executing this Agreement solely as Trustee under the 2010 Indenture. All rights, privileges, protections and immunities in favor of the 2010 Trustee under the 2010 Indenture are incorporated herein by reference. The 2018 Trustee is executing this Agreement solely as Trustee under the 2018 Indenture. All rights, privileges, protections and immunities in favor of the 2018 Trustee under the 2018 Indenture are incorporated herein by reference.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF, each of the undersigned has caused this Agreement to be duly executed and delivered as of the date first above written.

Grantors:


SEARS HOLDINGS CORPORATION

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer


CALIFORNIA BUILDER APPLIANCES, INC.  
FLORIDA BUILDER APPLIANCES, INC.  
K MART CORPORATION  
K MART HOLDING CORPORATION  
K MART OPERATIONS LLC  
SEARS OPERATIONS LLC  
SEARS, ROEBUCK AND CO.

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer


SEARS HOLDINGS MANAGEMENT  
CORPORATION  
SEARS HOME IMPROVEMENT PRODUCTS,  
INC.

By:   
Name: Robert A. Riecker  
Title: President

SEARS ROEBUCK ACCEPTANCE CORP.

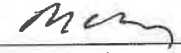
By:   
Name: Robert A. Riecker  
Title: Vice President, Finance

A&E FACTORY SERVICE, LLC  
A&E HOME DELIVERY, LLC  
A&E LAWN & GARDEN, LLC  
A&E SIGNATURE SERVICE, LLC  
KLC, INC.  
K MART OF MICHIGAN, INC.  
PRIVATE BRANDS, LTD.  
SEARS BRANDS MANAGEMENT  
CORPORATION  
SEARS PROTECTION COMPANY  
SEARS PROTECTION COMPANY (FLORIDA),  
L.L.C.  
SEARS, ROEBUCK DE PUERTO RICO, INC.  
SOE, INC.  
STARWEST, LLC

By:   
Name: Robert A. Riecker  
Title: Vice President


KMART.COM LLC

By: BlueLight.com, Inc., its Member

By:   
Name: Robert A. Riecker  
Title: Vice President

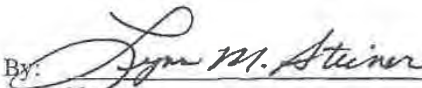
KMART OF WASHINGTON LLC  
K MART STORES OF ILLINOIS LLC  
K MART STORES OF TEXAS LLC  
MYGOFER LLC

By: Kmart Corporation, its Member

By:   
Name: Robert A. Riecker  
Title: Chief Financial Officer

**Collateral Agent:**

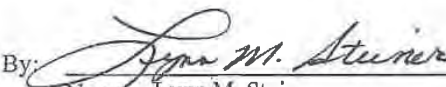
WILMINGTON TRUST, NATIONAL ASSOCIATION,  
as Collateral Agent

By: 

Name: Lynn M. Steiner  
Title: Vice President

**Junior Second Lien Agent:**

WILMINGTON TRUST, NATIONAL ASSOCIATION,  
as 2010 Trustee

By: 

Name: Lynn M. Steiner  
Title: Vice President

**Senior Second Lien Agents:**

COMPUTERSHARE TRUST COMPANY, N.A.,  
as 2018 Trustee

By: \_\_\_\_\_  
Name:  
Title:

JPP, LLC,  
as Second Lien Credit Agreement Agent

By: \_\_\_\_\_  
Name:  
Title:

*[Signature Page to Security Agreement]*

JX 132-191



**Collateral Agent:**

WILMINGTON TRUST, NATIONAL ASSOCIATION,  
as Collateral Agent

By: \_\_\_\_\_  
Name:  
Title:

**Junior Second Lien Agent:**

WILMINGTON TRUST, NATIONAL ASSOCIATION,  
as 2010 Trustee

By: \_\_\_\_\_  
Name:  
Title:

**Senior Second Lien Agents:**

COMPUTERSHARE TRUST COMPANY, N.A.,  
as Trustee

By: Michael A. Smith  
Name: Michael A. Smith  
Title: Trust Officer

JPP, LLC

By: \_\_\_\_\_  
Name:  
Title:

*[Signature Page to Security Agreement]*

JX 132-192

Collateral Agent:

WILMINGTON TRUST, NATIONAL ASSOCIATION,  
as Collateral Agent

By: \_\_\_\_\_  
Name:  
Title:

Junior Second Lien Agent:

WILMINGTON TRUST, NATIONAL ASSOCIATION,  
as 2010 Trustee


By: \_\_\_\_\_  
Name:  
Title:

Senior Second Lien Agents:

COMPUTERSHARE TRUST COMPANY, N.A.

By: \_\_\_\_\_  
Name:  
Title:

JPP, LLC

By:  \_\_\_\_\_  
Name: Edward S. Lampert  
Title: Member

*[Signature Page to Security Agreement]*

Schedule 1

GRANTORS AND NOTICE ADDRESSES OF GRANTORS

<u>Grantor</u>	<u>Notice Address</u>
Sears Roebuck Acceptance Corp.	3711 Kennett Pike Greenville, DE 19807
Kmart Corporation	3333 Beverly Road Hoffman Estates, IL 60179
Sears Holdings Corporation	3333 Beverly Road Hoffman Estates, IL 60179
A&E Factory Service, LLC	3333 Beverly Road Hoffman Estates, IL 60179
A&E Home Delivery, LLC	3333 Beverly Road Hoffman Estates, IL 60179
A&E Lawn & Garden, LLC	3333 Beverly Road Hoffman Estates, IL 60179
A&E Signature Service, LLC	3333 Beverly Road Hoffman Estates, IL 60179
California Builder Appliances, Inc.	6085 State Farm Dr., Suite 200 Rohnert Park, CA 94928
Florida Builder Appliances, Inc.	1742 W. Atlantic Blvd. Pompano Beach, FL 33069
KLC, Inc.	5000 San Dario Laredo, TX 78041
Kmart Holding Corporation	3333 Beverly Road Hoffman Estates, IL 60179
Kmart of Michigan, Inc.	3333 Beverly Road Hoffman Estates, IL 60179
Kmart of Washington LLC	3333 Beverly Road Hoffman Estates, IL 60179
Kmart Operations LLC	3333 Beverly Road Hoffman Estates, IL 60179
Kmart Stores of Illinois LLC	3333 Beverly Road Hoffman Estates, IL 60179
Kmart Stores of Texas LLC	3333 Beverly Road Hoffman Estates, IL 60179
Kmart.com LLC	3333 Beverly Road Hoffman Estates, IL 60179

<u>Grantor</u>	<u>Notice Address</u>
MyGofer LLC	3333 Beverly Road Hoffman Estates, IL 60179
Private Brands, Ltd.	3333 Beverly Road Hoffman Estates, IL 60179
Sears Brands Management Corporation	3333 Beverly Road Hoffman Estates, IL 60179
Sears Holdings Management Corporation	3333 Beverly Road Hoffman Estates, IL 60179
Sears Home Improvement Products, Inc.	3333 Beverly Road Hoffman Estates, IL 60179
Sears Operations LLC	3333 Beverly Road Hoffman Estates, IL 60179
Sears Protection Company	3333 Beverly Road Hoffman Estates, IL 60179
Sears Protection Company (Florida), L.L.C.	3333 Beverly Road Hoffman Estates, IL 60179
Sears, Roebuck and Co.	3333 Beverly Road Hoffman Estates, IL 60179
Sears, Roebuck de Puerto Rico, Inc.	Montehiedra Town Center-Kmart 2nd Flr. 9410 Avenida Los Romeros San Juan, PR 00926
SOE, Inc.	9025 S. Kyrene Road Tempe, AZ 85284
StarWest, LLC	9025 S. Kyrene Road Tempe, AZ 85284

Schedule 2

FILINGS

Uniform Commercial Code Filings

UCC-1 Financing Statements to be filed against the Grantors specified below with the Secretary of State of the jurisdictions set forth next to such Grantor's name:

<u>Grantor</u>	<u>Jurisdiction</u>
Sears Roebuck Acceptance Corp.	Delaware
Kmart Corporation	Michigan, Puerto Rico and Guam
Sears Holdings Corporation	Delaware
A&E Factory Service, LLC	Delaware
A&E Home Delivery, LLC	Delaware
A&E Lawn & Garden, LLC	Delaware
A&E Signature Service, LLC	Delaware
California Builder Appliances, Inc.	Delaware
Florida Builder Appliances, Inc.	Delaware
KLC, Inc.	Texas
Kmart Holding Corporation	Delaware
Kmart of Michigan, Inc.	Michigan
Kmart of Washington LLC	Washington
Kmart Operations LLC	Delaware
Kmart Stores of Illinois LLC	Illinois
Kmart Stores of Texas LLC	Texas
Kmart.com LLC	Delaware
MyGofer LLC	Delaware
Private Brands, Ltd.	Delaware
Sears Brands Management Corporation	Delaware and Puerto Rico
Sears Holdings Management Corporation	Delaware and Puerto Rico
Sears Home Improvement Products, Inc.	Pennsylvania
Sears Operations LLC	Delaware
Sears Protection Company	Illinois
Sears Protection Company (Florida), L.L.C.	Florida

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Sears, Roebuck and Co.	New York, Puerto Rico and Guam
Sears, Roebuck de Puerto Rico, Inc.	Delaware and Puerto Rico
SOE, Inc.	Delaware
StarWest, LLC	Delaware

Schedule 3

LOCATION OF JURISDICTION OF ORGANIZATION

<u>Grantor</u>	<u>Jurisdiction of Organization</u>	<u>Identification Number</u>
Sears Roebuck Acceptance Corp.	Delaware	0506120
Kmart Corporation	Michigan	142467
Sears Holdings Corporation	Delaware	3881360
A&E Factory Service, LLC	Delaware	3457178
A&E Home Delivery, LLC	Delaware	3877029
A&E Lawn & Garden, LLC	Delaware	3748766
A&E Signature Service, LLC	Delaware	3748765
California Builder Appliances, Inc.	Delaware	2862479
Florida Builder Appliances, Inc.	Delaware	2143982
KLC, Inc.	Texas	1276656
Kmart Holding Corporation	Delaware	3648953
Kmart of Michigan, Inc.	Michigan	33800A
Kmart of Washington LLC	Washington	602292492
Kmart Operations LLC	Delaware	5671829
Kmart Stores of Illinois LLC	Illinois	00912026
Kmart Stores of Texas LLC	Texas	800200422
Kmart.com LLC	Delaware	3138594
MyGofer LLC	Delaware	4631467
Private Brands, Ltd.	West Virginia	110640
Sears Brands Management Corporation	Delaware	0617118
Sears Holdings Management Corporation	Delaware	4041132
Sears Home Improvement Products, Inc.	Pennsylvania	2204417
Sears Operations LLC	Delaware	5671833
Sears Protection Company	Illinois	61825622
Sears Protection Company (Florida), L.L.C.	Florida	L03000020977
Sears, Roebuck and Co.	New York	NONE
Sears, Roebuck de Puerto Rico, Inc.	Delaware	0561919
SOE, Inc.	Delaware	3816328

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StarWest, LLC	Delaware	3833707
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EXHIBIT I

[Form of]

**[JUNIOR SECOND LIEN]/[SENIOR SECOND LIEN] JOINDER AGREEMENT**

The undersigned (the “[Junior Second Lien]/[Senior Second Lien] Agent”) is the [agent/trustee/representative] for Persons wishing to become “Secured Parties” (the “New Secured Parties”) under the Amended and Restated Security Agreement, dated as of March 20, 2018 (as amended and/or supplemented, the “Security Agreement” (terms used without definition herein have the meanings assigned to such terms by the Security Agreement)) among Sears Holdings Corporation, the other Grantors party thereto, Wilmington Trust, National Association, as Collateral Agent (the “Collateral Agent”) and the other agents party thereto.

In consideration of the foregoing, the undersigned hereby:

(i) represents that the [Junior Second Lien]/[Senior Second Lien] Agent has been authorized by the New Secured Parties to become a party to the Security Agreement on behalf of the New Secured Parties under that [DESCRIBE OPERATIVE AGREEMENT] (the obligations thereunder and under the ancillary documents referred to therein, the “New Secured Obligations”) and to act as the [Junior Second Lien]/[Senior Second Lien] Agent for the New Secured Parties hereunder and under the Security Agreement;

(ii) acknowledges that the New Secured Parties have received a copy of the Security Agreement;

(iii) irrevocably appoints and authorizes the Collateral Agent to take such action as agent on its behalf and to exercise such powers under the Security Agreement and the other Security Documents as are delegated to the Collateral Agent by the terms thereof, together with all such powers as are reasonably incidental thereto; and

(iv) accepts and acknowledges, for itself and the other New Secured Parties, the terms of the Security Agreement applicable to it and the New Secured Parties and agrees to serve as [Junior Second Lien]/[Senior Second Lien] Agent for the New Secured Parties with respect to the New Secured Obligations and agrees on its own behalf and on behalf of the New Secured Parties to be bound by the terms of the Security Agreement and the other Security Documents applicable to holders of Secured Obligations, with all the rights and obligations of a Secured Party thereunder and bound by all the provisions thereof as fully as if it had been a Secured Party on the effective date of the Security Agreement.

The name and address of the representative for purposes of Section 7.4 of the Security Agreement are as follows:

**[name and address of [Junior Second Lien]/[Senior Second Lien] Agent]**

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IN WITNESS WHEREOF, the undersigned has caused this [Junior Second Lien]/[Senior Second Lien] Joinder Agreement to be duly executed by its authorized officer as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

[NAME]

By: \_\_\_\_\_  
Name:  
Title:

AGREED TO AND ACCEPTED:

The Collateral Agent hereby acknowledges its acceptance of this [Junior Second Lien]/[Senior Second Lien] Joinder Agreement and agrees to act as Collateral Agent for the New Secured Parties, subject to the terms of the [agency agreement, dated as of \_\_\_\_\_].

WILMINGTON TRUST, NATIONAL ASSOCIATION, as Collateral Agent

By: \_\_\_\_\_  
Name:  
Title:

JX 132-201

EXHIBIT II

FORM OF ASSUMPTION AGREEMENT

ASSUMPTION AGREEMENT, dated as of [ ], 20\_\_], made by [ ] (the "Additional Grantor"), in favor of WILMINGTON TRUST, NATIONAL ASSOCIATION, as collateral agent (the "Collateral Agent"), for the benefit of the Secured Parties pursuant to the Security Agreement referred to below. All capitalized terms not defined herein shall have the meaning ascribed to them in such Security Agreement.

WITNESSETH

WHEREAS, Sears Holdings Corporation ("Holdings") and certain of its Subsidiaries (other than the Additional Grantor) have entered into that certain Amended and Restated Security Agreement, dated as of March 20, 2018 (as amended, supplemented or otherwise modified from time to time, the "Security Agreement"), in favor of the Collateral Agent for the benefit of the Secured Parties;

WHEREAS, the Security Agreement and/or the applicable Second Lien Documents (as defined in the Security Agreement) requires the Additional Grantor to become a party to the Security Agreement; and

WHEREAS, the Additional Grantor has agreed to execute and deliver this Assumption Agreement in order to become a party to the Security Agreement.

NOW, THEREFORE, IT IS AGREED:

1. Security Agreement. By executing and delivering this Assumption Agreement, the Additional Grantor, as provided in Section 7.15 of the Security Agreement, hereby becomes a party to the Security Agreement as a Grantor thereunder with the same force and effect as if originally named therein as a Grantor and, without limiting the generality of the foregoing, hereby expressly assumes all obligations and liabilities of a Grantor thereunder, and grants to the Collateral Agent for the benefit of the Secured Parties a security interest in all Collateral of such Additional Grantor to secure the Secured Obligations. The information set forth in Annex 1-A hereto is hereby added to the information set forth in the Schedules to the Security Agreement. The Additional Grantor hereby represents and warrants that each of the representations and warranties contained in Section 3 of the Security Agreement is, as to such Additional Grantor, true and correct on and as of the date hereof (after giving effect to this Assumption Agreement) as if made on and as of such date.

2. Governing Law. THIS ASSUMPTION AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, BUT WITHOUT GIVING EFFECT TO APPLICABLE PRINCIPLES OF CONFLICTS OF LAW TO THE EXTENT THAT THE APPLICATION OF THE LAW OF ANOTHER JURISDICTION WOULD BE REQUIRED THEREBY.

[Remainder of Page intentionally left blank]



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IN WITNESS WHEREOF, the undersigned has caused this Assumption Agreement to be  
duly executed and delivered as of the date first above written.

[ADDITIONAL GRANTOR]

By: \_\_\_\_\_  
Name:  
Title:

Annex 1-A to  
Assumption Agreement

Supplement to Schedule 1

Supplement to Schedule 2

Supplement to Schedule 3

# **EXHIBIT I**

EXHIBIT I  
TO  
ADDENDUM TO PROOF OF CLAIM FILED BY  
WILMINGTON TRUST, NATIONAL ASSOCIATION  
AS INDENTURE TRUSTEE AND COLLATERAL AGENT

PERFECTION OF SECURITY INTERESTS

**DEBTOR: Sears Holdings Corporation, a Delaware corporation ("Holdings")**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3552621	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2655941	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Kmart Corporation, a Michigan corporation ("Kmart")**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
MI SOS	2010137071 - 6	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
MI SOS	2015088447 - 3	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent
Guam Commissioner of Banking & Insurance	28756	10/13/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
Guam Commissioner of Banking & Insurance	29179	6/23/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent
Puerto Rico SOS	2010005803	10/28/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
Puerto Rico SOS	illegible	7/2/2014	UCC-3 Financing Statement	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Sears, Roebuck and Co., a New York corporation ("SRAC")**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
NY SOS	201010120551842	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
NY SOS	201608150389181	8/15/2016	UCC-1 Financing Statement	Wilmington Trust, National Association, as Collateral Agent
Guam Commissioner of Banking & Insurance	28757	10/13/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
Guam Commissioner of Banking & Insurance	29178	6/23/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent
Puerto Rico SOS	2010 005906	10/28/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
Puerto Rico SOS	illegible	7/2/2014	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Sears, Roebuck de Puerto Rico, Inc., a Delaware corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3552951	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2656170	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent
Puerto Rico SOS	2010005908	10/28/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
Puerto Rico SOS	illegible	7/2/2014	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: A&E Home Delivery, LLC, a Delaware limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3550047	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2654746	6/22/2015	UCC-3 - Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: A&E Lawn & Garden, LLC, a Delaware limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3550377	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2654829	6/22/2015	UCC-3 - Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: A&E Signature Service, LLC, a Delaware limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3550617	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2655032	6/22/2015	UCC-3 - Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: California Builder Appliances, Inc., a Delaware corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3550781	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2655198	6/22/2015	UCC-3 - Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Florida Builder Appliances, Inc., a Delaware corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3550880	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2655248	6/22/2015	UCC-3 - Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: KLC, Inc., a Texas corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
TX SOS	10-0029500067	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
TX SOS	15-00202816	6/22/2015	UCC-3 - Continuation	Wilmington Trust, National Association, as Collateral Agent



**DEBTOR: Kmart Stores of Illinois LLC, an Illinois limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
IL SOS	15671645 FS	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
IL SOS	9362229 CT	6/22/2015	UCC-3 - Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Kmart Stores of Texas LLC, a Texas limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
TX SOS	10-0029500188	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
TX SOS	15-00202815	6/22/2015	UCC-3 - Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Kmart Holding Corporation, a Delaware corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3551052	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2655339	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Kmart Management Corporation, a Michigan corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
MI SOS	2010137072-8	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
MI SOS	2015088445-9	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Kmart of Michigan, Inc., a Michigan corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
MI SOS	2010137075-4	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
MI SOS	2015088446-1	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Kmart of Washington LLC, a Washington limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
WA SOS	2010-286-2911-6	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
WA SOS	2015-173-1581-0	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Kmart.com LLC, a Delaware limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010-3551169	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015-2655503	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: MyGofer LLC, a Delaware limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010-3552241	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015-2655594	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Private Brands, Ltd., a Delaware corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2011-1274409	4/6/2011	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2014-2601474	7/1/2014	UCC-3 Amendment	Wilmington Trust, National Association, as Collateral Agent
DE SOS	2015-4635032	10/12/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Sears Protection Company, an Illinois corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
IL SOS	15671653 FS	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
IL SOS	9362228 CT	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: SOE, Inc., a Delaware corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3553140	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2656287	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Sears Brands Management Corporation., a Delaware corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3552597	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2655727	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent
Puerto Rico SOS	2010005909	10/28/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
Puerto Rico SOS	illegible	7/2/2014	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Sears Holdings Management Corporation, a Delaware corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3552670	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2656006	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent
Puerto Rico SOS	2010005910	10/28/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
Puerto Rico SOS	illegible	7/2/2014	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent



**DEBTOR: Sears Home Improvement Products Inc., a Pennsylvania corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
PA SOS	2010101403403	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
PA SOS	2015062307829	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Sears Protection Company (Florida), L.L.C., a Florida limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
FL SOS	201003379646	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
FL SOS	201504201653	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Sears Roebuck Acceptance Corp., a Delaware corporation**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3552795	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2656071	6/22/2015	UCC-3 Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: StarWest, LLC, a Delaware limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2010 3553223	10/12/2010	UCC-1 Financing Statement	Wells Fargo Bank, National Association, as Collateral Agent
DE SOS	2015 2656337	6/22/2015	UCC3 - Continuation	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: A&E Factory Service, LLC, a Delaware limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2016 5717614	9/19/2016	UCC-1 Financing Statement	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Kmart Operations LLC, a Delaware limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2015 2918638	7/7/2015	UCC-1 Financing Statement	Wilmington Trust, National Association, as Collateral Agent

**DEBTOR: Sears Operations LLC, a Delaware limited liability company**

Jurisdiction	Filing Number	Filing Date	Type of Filing	Secured Party
DE SOS	2015 2918596	7/7/2015	UCC-1 Financing Statement	Wilmington Trust, National Association, as Collateral Agent

# Exhibit 93



UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Fill in this information to identify the case (Select only one Debtor per claim form):

<input type="checkbox"/> Sears Holdings Corporation (18-23538)	<input type="checkbox"/> Kmart Corporation (18-23549)	<input type="checkbox"/> Sears, Roebuck de Puerto Rico, Inc. (18-23561)	<input type="checkbox"/> MyGofer LLC (18-23573)	<input type="checkbox"/> Kmart.com LLC (18-23585)
<input type="checkbox"/> Sears, Roebuck and Co. (18-23537)	<input type="checkbox"/> MaxServ, Inc. (18-23550)	<input type="checkbox"/> SYW Relay LLC (18-23562)	<input type="checkbox"/> Sears Brands Business Unit Corporation (18-23574)	<input type="checkbox"/> Sears Brands Management Corporation (18-23586)
<input type="checkbox"/> Kmart Holding Corporation (18-23539)	<input type="checkbox"/> Private Brands, Ltd. (18-23551)	<input type="checkbox"/> Wally Labs LLC (18-23563)	<input type="checkbox"/> Sears Holdings Publishing Company, LLC (18-23575)	<input type="checkbox"/> SHC Licensed Business LLC (18-23616)
<input type="checkbox"/> Kmart Operations LLC (18-23540)	<input type="checkbox"/> Sears Development Co. (18-23552)	<input type="checkbox"/> Big Beaver of Florida Development, LLC (18-23564)	<input type="checkbox"/> Kmart of Michigan, Inc. (18-23576)	<input type="checkbox"/> SHC Promotions LLC (18-23630)
<input type="checkbox"/> Sears Operations LLC (18-23541)	<input type="checkbox"/> Sears Holdings Management Corporation (18-23553)	<input type="checkbox"/> California Builder Appliances, Inc. (18-23565)	<input type="checkbox"/> SHC Desert Springs, LLC (18-23577)	<input type="checkbox"/> SRe Holding Corporation (19-22301)
<input type="checkbox"/> ServiceLive, Inc. (18-23542)	<input type="checkbox"/> Sears Home & Business Franchises, Inc. (18-23554)	<input type="checkbox"/> Florida Builder Appliances, Inc. (18-23566)	<input type="checkbox"/> SOE, Inc. (18-23578)	
<input type="checkbox"/> A&E Factory Service, LLC (18-23543)	<input type="checkbox"/> Sears Home Improvement Products, Inc. (18-23555)	<input type="checkbox"/> KBL Holding Inc. (18-23567)	<input type="checkbox"/> StarWest, LLC (18-23579)	
<input type="checkbox"/> A&E Home Delivery, LLC (18-23544)	<input type="checkbox"/> Sears Insurance Services, L.L.C. (18-23556)	<input type="checkbox"/> KLC, Inc. (18-23568)	<input type="checkbox"/> STI Merchandising, Inc. (18-23580)	
<input type="checkbox"/> A&E Lawn & Garden, LLC (18-23545)	<input type="checkbox"/> Sears Procurement Services, Inc. (18-23557)	<input type="checkbox"/> Sears Protection Company (Florida), L.L.C. (18-23569)	<input type="checkbox"/> Troy Coolidge No. 13, LLC (18-23581)	
<input type="checkbox"/> A&E Signature Service, LLC (18-23546)	<input type="checkbox"/> Sears Protection Company (18-23558)	<input type="checkbox"/> Kmart of Washington LLC (18-23570)	<input type="checkbox"/> BlueLight.com, Inc. (18-23582)	
<input type="checkbox"/> FBA Holdings Inc. (18-23547)	<input type="checkbox"/> Sears Protection Company (PR) Inc. (18-23559)	<input type="checkbox"/> Kmart Stores of Illinois LLC (18-23571)	<input type="checkbox"/> Sears Brands, L.L.C. (18-23583)	
<input type="checkbox"/> Innovel Solutions, Inc. (18-23548)	<input checked="" type="checkbox"/> Sears Roebuck Acceptance Corp. (18-23560)	<input type="checkbox"/> Kmart Stores of Texas LLC (18-23572)	<input type="checkbox"/> Sears Buying Services, Inc. (18-23584)	

RECEIVED

APR 04 2019

PRIME CLERK LLC



182353880006750

Proof of Claim

04/16

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense, other than a claim entitled to administrative priority pursuant to 11 U.S.C. § 503(b)(9). Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	Computershare Trust Company, N.A., as Indenture Trustee for 6.625% Second Lien PIK Notes	
	Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom?	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent?	Where should payments to the creditor be sent? (if different)
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Kelley Drye & Warren, LLP, Attn: Pamela Bruzzese-Szczygiel 101 Park Avenue New York, NY 10178	Computershare Trust Company, N.A., as Trustee Attn: Michael A. Smith 2950 Express Drive South, Suite 210 Islandia, NY 11749
	Contact phone 212-808-7800	Contact phone 631-233-6330
	Contact email PBruzzese-Szczygiel@kelleydrye.com	Contact email michael.smith2@computershare.com
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known)	
	Filed on MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing?	

☒ Date Stamped Copy Returned  
☐ No Self-Addressed Stamped Envelope  
☐ No Copy Provided

Proof of Claim

page 1

Claim Number: 14268

JX 133-1

**Part 2:** Give Information About the Claim as of the Date the Case Was Filed

<b>6. Do you have any number you use to identify the debtor?</b>	
<input checked="" type="checkbox"/> No	<input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____
<b>7. How much is the claim?</b> \$ <u>181,252,919.00</u> <b>Does this amount include interest or other charges?</b>	
<input type="checkbox"/> No	
<input checked="" type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).	
<b>8. What is the basis of the claim?</b>	
Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information.	
<u>see addendum</u>	
<b>9. Is all or part of the claim secured?</b>	
<input type="checkbox"/> No	<input checked="" type="checkbox"/> Yes. The claim is secured by a lien on property.
<b>Nature of property:</b>	
<input type="checkbox"/> Real estate. If the claim is secured by the debtor's principal residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> .	
<input type="checkbox"/> Motor vehicle	
<input checked="" type="checkbox"/> Other. Describe: <u>see addendum</u>	
<b>Basis for perfection:</b> <u>see addendum</u>	
Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)	
<b>Value of property:</b> \$ _____	
<b>Amount of the claim that is secured:</b> \$ _____	
<b>Amount of the claim that is unsecured:</b> \$ _____ (The sum of the secured and unsecured amounts should match the amount in line 7.)	
<b>Amount necessary to cure any default as of the date of the petition:</b> \$ _____	
<b>Annual Interest Rate</b> (when case was filed) <u>6.63</u> %	
<input checked="" type="checkbox"/> Fixed	
<input type="checkbox"/> Variable	
<b>10. Is this claim based on a lease?</b>	
<input checked="" type="checkbox"/> No	<input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
<b>11. Is this claim subject to a right of setoff?</b>	
<input checked="" type="checkbox"/> No	<input type="checkbox"/> Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☒ No

☐ Yes. Check one:

	Amount entitled to priority
<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	\$ _____
<input type="checkbox"/> Up to \$2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____
<input type="checkbox"/> Wages, salaries, or commissions (up to \$12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____
<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____
<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)( ) that applies.	\$ _____

\* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim entitled to administrative priority pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the Debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. \$ \_\_\_\_\_

**Part 3:** Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☒ I am the creditor.
- ☐ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/01/2019 (mm/dd/yyyy)

Signature

Print the name of the person who is completing and signing this claim:

Name of the person who is completing and signing this claim:

Name Michael A. Smith  
First name Middle name Last name

Title Vice President - Trust Officer

Company Computershare Trust Company, N.A.  
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address 2950 Express Drive South, Suite 210  
Number Street  
Islandia NY 11749  
City State ZIP Code

Contact phone 631-233-6330 Email michael.smith2@computershare.com

**ADDENDUM TO MASTER PROOF OF CLAIM OF COMPUTERSHARE TRUST  
COMPANY, N.A., AS INDENTURE TRUSTEE UNDER THE INDENTURE DATED AS  
OF MARCH 20, 2018 (AS AMENDED AND SUPPLEMENTED)**

**I. BASIS FOR CLAIM**

Computershare Trust Company, N.A. (“**Computershare**”) is the indenture trustee for the holders of the 6.625% Senior Secured Convertible PIK Toggle Notes due 2019 (the “**Second Lien PIK Notes**”) issued under the Indenture, dated as of March 20, 2018 by and among Sears Holdings Corporation, as Issuer (the “**Issuer**”), the guarantors party thereto, including Sears Roebuck Acceptance Corp. (the “**Debtor**”), Computershare, as Trustee (the “**Indenture Trustee**”) (as it thereafter may have been amended, supplemented or modified from time to time, the “**Indenture**”),<sup>1</sup> pursuant to which the Issuer issued the Second Lien PIK Notes. Pursuant to the terms of the Indenture, repayment of the Second Lien PIK Notes is guaranteed by the Debtor and by each of the affiliates of the Issuer listed on Exhibit A hereto.

Pursuant to the Indenture, the Issuer issued the Second Lien PIK Notes, of which approximately \$181,253,000 in aggregate principal amount, plus charges, fees and other amounts owing under the Second Lien PIK Notes Documents (defined below) or applicable law, were outstanding as of the Petition Date (defined below). The specific claim amounts asserted at this time are specified below in Part II.

Pursuant to the *Order (I) Establishing Deadline to File Proofs of Claim and Procedures Relating Thereto, (II) Approving the Form and Manner of Notice Thereof, (III) Approving Procedures for the Resolution of Claims Asserted Pursuant to 11 U.S.C. § 503(B)(9), and (IV) Prohibiting Vendors From Pursuing Such Claims Outside the Procedures* [Doc. No. 2676] (the “**Bar Date Order**”), Section 6.10 of the Indenture and Rule 3003 of the Federal Rules of Bankruptcy Procedure, the Indenture Trustee is authorized to file this Master Proof of Claim

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<sup>1</sup> Capitalized terms not defined herein shall have the meaning ascribed to such terms in the Indenture.

against the Debtor on behalf of itself and each holder of the Second Lien PIK Notes (the “**Noteholders**”) in the chapter 11 case of the Issuer.

As permitted by the Bar Date Order, because of the voluminous nature of the Second Lien PIK Notes, the Indenture and any related documentation (collectively, the “**Second Lien PIK Notes Documents**”) that support this Master Proof of Claim, most of which are or should be in the Debtor’s possession, the Second Lien PIK Notes Documents are not annexed hereto, but each is hereby expressly incorporated by reference. Counsel for the Indenture Trustee will make copies of the Second Lien PIK Notes Documents available to any party in interest who requests them in writing within ten (10) business days after counsel receives such request. Requests for copies of the Second Lien PIK Notes Documents should be in writing and directed to counsel for the Indenture Trustee, Kelley Drye & Warren LLP, 101 Park Avenue, New York, New York 10178, Attention: Benjamin D. Feder, Esq., [bfeder@kelleydrye.com](mailto:bfeder@kelleydrye.com).

## **II. CLASSIFICATION OF CLAIMS AND TOTAL AMOUNT OF CLAIMS AT TIME CASE FILED**

Pursuant to the Second Lien PIK Notes Documents, the Debtor, as a guarantor under the Indenture, was, as of October 15, 2018, the date the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “**Petition Date**”), and is currently absolutely and unconditionally indebted to the Indenture Trustee, on behalf of itself and the Noteholders, in the amount of not less than \$181,252,919.00, which consists of the following:

- (a) Principal Amount: \$ 181,252,919.00, which includes \$5,811,498.00 of PIK Interest which was to be issued on October 15, 2018, less the principal amount of the portion of the Second Lien PIK Notes which comprised Credit Bid Obligations.<sup>2</sup>

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<sup>2</sup> As defined in the *Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors’ Assets Free and Clear of Liens, Claims, Interests and*

(b) Accrued Unpaid Interest:

- (i) accrued and unpaid interest from and after the Petition Date at the rate of interest specified in the Second Lien PIK Notes and the Indenture; plus
- (ii) interest on overdue installments of interest and Special Interest, to the extent lawful, from and after the Petition Date at the rate of interest specified in the Second Lien PIK Notes and the Indenture.

(c) Classification of Claims:

- (i) Secured Claim against the Debtor: This Master Proof of Claim asserts a claim against the Debtor secured by valid, binding, continuing, enforceable and properly perfected liens on, and security interests in, the Collateral. The liens on the Collateral arise under both law and equity. Accordingly, this Master Proof of Claim is filed against the Debtor as a secured claim to the extent of the value of the Collateral.
- (ii) Unsecured Claim against the Debtor: Subject to, and without in any way waiving or limiting the rights of the Indenture Trustee and/or the Noteholders under the Bankruptcy Code as holders of a secured claim, if the value of the Collateral is less than the total amount of the secured claim described above (including all accrued and unpaid interest and costs and all other amounts to which the Indenture Trustee and/or the Noteholders may be entitled under the Second Lien PIK Notes Documents), the remainder of such claim is filed as a general unsecured claim against the Debtor, to the extent of any deficiency.

(d) Indenture Trustee Compensation and Expenses:

The Debtor is obligated to the Indenture Trustee for any and all amounts due and to become due to the Indenture Trustee, whether arising before or after the Petition Date, for its compensation, for all reasonable out-of-pocket expenses incurred or made by the Indenture Trustee (including the reasonable compensation and expenses, disbursements and advances of the Indenture Trustee's agents, counsel (including, without limitation, Kelley Drye & Warren

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*Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases In Connection Therewith and (IV) Granting Related Relief [Doc. No. 2507] (the "Sale Order").*



LLP and any additional or successor counsel), accountants and experts), for indemnification and for all other amounts due or to become due to the Indenture Trustee under the Indenture (including Section 7.01 thereof) or any other Second Lien PIK Notes Document (collectively, the "***Indenture Trustee Charges***"). The Indenture Trustee will continue to incur Indenture Trustee Charges from and after the date hereof, which amounts are not fixed at this time but constitute a part of this Master Proof of Claim. The Indenture Trustee does not waive any rights with respect to the Indenture Trustee Charges by not stating a specific figure therefor at this time. The Indenture Trustee has a lien prior to the Second Lien PIK Notes for all Indenture Trustee Charges on all money or property held or collected by the Indenture Trustee and is entitled to priority payment pursuant to Section 6.11 of the Indenture.

(e) Other Unliquidated Amounts.

The Debtor is obligated to the Indenture Trustee for any and all other amounts due or to become due with respect to, arising from or in connection with the Second Lien PIK Notes Documents on any basis, in law or in equity, whether now due or hereafter arising, which amounts may presently be unliquidated or contingent, but may become fixed and liquidated in the future, and all damages for breach of any covenant, representation, warranty or other provision of the Indenture or the other Second Lien PIK Notes Documents. Such amounts include, among other things, all amounts related to a make-whole and/or optional redemption provisions contained in the Indenture and the Second Lien PIK Notes. The total of all such other amounts cannot, at this time, be reasonably calculated or estimated, and the Indenture Trustee does not waive any rights with respect to such other amounts by not stating a specific figure therefore at this time.

All payments or distributions on account of the claim under the Indenture asserted hereby must be made to or at the direction of the Indenture Trustee. Prior to making any payments or

distributions on account of such claim, the Debtor should consult with counsel for the Indenture Trustee regarding the delivery of such payments or distributions.

### **III. INQUIRY NOTICE**

This Master Proof of Claim serves, and is intended to serve, as a notice of a claim against the Debtor for any and all amounts due or to become due under the Second Lien PIK Notes Documents to the Indenture Trustee and/or the Noteholders as set forth in this Master Proof of Claim, the provisions of each of which are expressly incorporated herein by reference, whether or not summarized or identified specifically in this Master Proof of Claim, and all interested parties are on notice of, and advised to examine carefully the provisions of the Second Lien PIK Notes Documents to determine, among other things, the full scope of this Master Proof of Claim.

### **IV. RESERVATION OF RIGHTS**

This Master Proof of Claim is not an election of remedies or waiver of any claims not expressly asserted herein. The Indenture Trustee does not waive, and expressly reserves, all rights and remedies at law or in equity that Computershare, individually or as Indenture Trustee, has or may have against the Debtor, or any other person or entity, including, without limitation, rights that can be asserted by the Indenture Trustee on behalf of the Noteholders, whether such right or remedy arises before, upon or after the Petition Date. The Indenture Trustee further reserves all of its procedural and substantive defenses to any claim that may be asserted against Computershare, individually or as Indenture Trustee, by the Debtor, or any other person or entity. Nothing in this Master Proof of Claim is intended or should be construed to limit the Indenture Trustee's rights, remedies, or interests with respect to the subject matter of this Master Proof of Claim.

The Indenture Trustee also reserves the right to (i) amend, revise, update, or supplement this Master Proof of Claim at any time and in any respect, including, without limitation, the addition of further documents and information, as necessary or appropriate to support, amend,

quantify or correct amounts, to provide additional detail regarding the claims set forth herein, to assert alternative theories of recovery, or to fix the amount of any contingent or unliquidated claim, (ii) file additional proofs of claim for additional claims that may be based on the same or additional documents or other liability or indebtedness of the Debtor, to the Indenture Trustee, and (iii) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the above amounts and additional amounts.

This Master Proof of Claim is not intended to be, and shall not be construed as (i) a waiver of any defaults, or (ii) a waiver or limitation of any rights at law or equity, remedies, claims or interests of the Indenture Trustee, including, without limitation, the right to seek a trial by jury with respect to any contested proceeding arising from or pertaining to any of the claims set forth herein. Without in any way limiting the generality of the above reservations of rights, the Indenture Trustee hereby expressly reserves the right to assert that the portion of its fees and expenses (including the fees and expenses of its agents and counsel) relating to services rendered on and after the Petition Date constitute expenses of administration under the United States Bankruptcy Code to the extent such expenses are not otherwise paid in full, and the Indenture Trustee reserves the right to file a claim, application or request for payment of administrative expenses.

**V. JUDGMENTS**

No judgment has been rendered on this Master Proof of Claim or the matters set forth herein.

**VI. CREDITS AND SETOFF**

As of the Petition Date, to the best of the Indenture Trustee's knowledge, other than as may be set forth in the Sale Order, the claims asserted in this Master Proof of Claim are not subject to any setoffs or counterclaims. To the extent the Debtor asserts any claims against the

Indenture Trustee or the Noteholders (or any of them), the Indenture Trustee reserves the right to assert that such claims are subject to the rights of setoff and/or recoupment.

**Exhibit A**

**Guarantors**

A&E Factory Service, LLC  
A&E Home Delivery, LLC  
A&E Lawn & Garden, LLC  
A&E Signature Service, LLC  
California Builder Appliances, Inc.  
Florida Builder Appliances, Inc.  
KLC, Inc  
Kmart Corporation  
Kmart Holding Corporation  
Kmart of Michigan, Inc.  
Kmart of Washington LLC  
Kmart Operations LLC  
Kmart Stores of Illinois LLC  
Kmart Stores of Texas LLC  
Kmart.com LLC (f/k/a Bluelight.com LLC)  
MyGofer LLC  
Private Brands, Ltd.  
Sears Brands Management Corporation (f/k/a Sears International Marketing, Inc.)  
Sears Holdings Management Corporation  
Sears Home Improvement Products, Inc.  
Sears Operations LLC  
Sears Protection Company  
Sears Protection Company (Florida), L.L.C.  
Sears Roebuck Acceptance Corp.  
Sears, Roebuck and Co.  
Sears, Roebuck de Puerto Rico, Inc.  
SOE, Inc. (f/k/a SOE, LLC)  
StarWest, LLC

# Prime Clerk

## Manhattan

### CLAIM/BALLOT HAND DELIVERY CONFIRMATION SHEET

DATE RECEIVED: 4/4/19

CASE: Sears

NO. OF CLAIMS: 28

NO. OF BALLOTS: \_\_\_\_\_

COPIES: 28

RECEIVED BY: Sm5



# **Exhibit 94**



sears

SHOP  
YOUR  
WAY



CRAFTSMAN

DieHard



# Project Blue Wind Down Budget

January 10, 2019

**PRIVILEGED AND CONFIDENTIAL –  
DRAFT FOR DISCUSSION PURPOSES –  
SUBJECT TO FRE 408**

SEARS HOLDINGS

CONFIDENTIAL

SEARS-WT\_000093  
JX 134-1

**PRIVILEGED AND CONFIDENTIAL – DRAFT FOR DISCUSSION PURPOSES – SUBJECT TO FRE 408**

# Wind Down Budget Lender Paydown and Collateral

- **Total book value of first lien collateral as of 1/3/2019 borrowing base: \$1.9bn**
  - Includes \$1.83bn of inventory, \$57mm of CC receivables, and \$8mm of Rx receivables
    - Does not include pharmacy scripts or pari passu DIP collateral
- **We project realization of a 90% NOLV on liquidated inventory in wave 3 and wave 4 during the liquidation**
- **Gross proceeds from all sources over the 13 weeks is \$2.3bn (net of sales tax)**
  - Gross proceeds from merchandise liquidation of \$1,853mm
  - Normal course non-GOB merchandise receipts of \$244mm
  - Other cash receipts of \$134mm
  - Pharmacy Script proceeds of \$70mm
  - Augment net proceeds of \$7mm
  - Non-refundable ESL deposit forfeit of \$17mm
  - Estimated TSA receipts of \$10mm
- **DIP ABL is fully paid by week ending 3/16/19**
  - No increase in net ABL borrowings over the 13 weeks ending 4/6/2019
  - FILO is fully paid by week ending 3/23/2019
- **Collateral coverage increases consistently over the 13 weeks ending 4/6/2019**

**LTV Calculation as of Week Ending:**

1/5	1/12	1/19	1/26	2/2	2/9	2/16	2/23	3/2	3/9	3/16	3/23	3/30	4/6
2019	2019	2019	2019	2019	2019	2019	2019	2019	2019	2019	2019	2019	2019
79%	85%	87%	85%	84%	82%	85%	81%	91%	68%	27%	34%	0%	0%

<sup>1</sup> The final Wave 4 GOB sales continue one week past the 13 week period ending 4/6/19

<sup>2</sup> Value excluded over time period includes: \$20mm from final week of GOB sale, \$174mm of normal course COGS, \$64mm of customer deposits, \$65mm of pledged receivables, and \$12mm of other

<sup>3</sup> NOLV calculated for the 13 week period represents blended average of wave 2, wave 3, and wave 4; due to the lower NOLV for the tail end of wave 2, blended NOLV during the time period is below 90%

## 13 Weeks Ending 4/6/19

### 1L SUMMARY

DIP Revolver	452
DIP Term Loan	424
ABL LC	119
FILO	125
<b>Total</b>	<b>\$1,119</b>

### COLLATERAL SUMMARY

Inventory (Book)	\$1,829
CC Receivables	57
Pharmacy Receivables	8
<b>Gross Collateral - 1/4/19</b>	<b>\$1,894</b>
Less: Adjustments <sup>2</sup>	(333)
<b>Subject for GOB Liquidation</b>	<b>\$1,560</b>

### PROCEEDS SUMMARY

Gross proceeds generated over	
13-week period ending 4/6/2019:	\$2,335
GOB Proceeds	\$1,853
Liquidation Expense	(457)
Net GOB Proceeds	\$1,396
NOLV % <sup>3</sup>	89%
ABL Paydown	(994)
FILO Paydown	(125)
<b>Total 1L Paydown</b>	<b>(\$1,119)</b>



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**PRIVILEGED AND CONFIDENTIAL – DRAFT FOR DISCUSSION PURPOSES – SUBJECT TO FRE 408**

# Wind Down Budget Lender Paydown and Collateral – Sensitivity Analysis at 83% NOLV

**The Company also ran an alternative scenario showing GOB sales yielding an 83% NOLV, in this scenario results are as follows:**

- **Total book value of first lien collateral as of 1/3/2019 borrowing base: \$1.9bn**
  - Includes \$1.83bn of inventory, \$57mm of CC receivables, and \$8mm of Rx receivables
    - Does not include pharmacy scripts or pari passu DIP collateral
- **We project realization of a 83% NOLV on liquidated inventory in wave 3 and wave 4 during the liquidation**
- **Gross proceeds from all sources over the 13 weeks is \$2.2bn (net of sales tax)**
  - Gross proceeds from merchandise liquidation of \$1,745mm
  - Normal course non-GOB merchandise receipts of \$244mm
  - Other cash receipts of \$134mm
  - Pharmacy Script proceeds of \$70mm
  - Augment net proceeds of \$7mm
  - Non-refundable ESL deposit forfeit of \$17mm
  - Estimated TSA receipts of \$10mm
- **DIP ABL is fully paid by 3/23/19**
  - No increase in net ABL borrowings over the 13 weeks ending 4/6/2019
  - FILO is fully paid by week ending 4/6/2019
- **Collateral coverage increases consistently over the 13 weeks ending 4/6/2019**

**LTV Calculation as of Week Ending:**

1/5 2019	1/12 2019	1/19 2019	1/26 2019	2/2 2019	2/9 2019	2/16 2019	2/23 2019	3/2 2019	3/9 2019	3/16 2019	3/23 2019	3/30 2019	4/6 2019
79%	85%	87%	86%	86%	86%	81%	79%	65%	69%	82%	88%	99%	0%

## 13 Weeks Ending 4/6/19

### 1L SUMMARY

DIP Revolver	452
DIP Term Loan	424
ABL LC	119
FILO	125
<b>Total</b>	<b>\$1,119</b>

### COLLATERAL SUMMARY

Inventory (Book)	\$1,829
CC Receivables	57
Pharmacy Receivables	8
<b>Gross Collateral - 1/4/19</b>	<b>\$1,894</b>
Less: Adjustments <sup>2</sup>	(333)
<b>Subject for GOB Liquidation</b>	<b>\$1,560</b>

### PROCEEDS SUMMARY

Gross proceeds generated over	
13-week period ending 4/6/2019:	\$2,226
GOB Proceeds	\$1,745
Liquidation Expense	(457)
Net GOB Proceeds	\$1,288
NOLV % <sup>3</sup>	83%
ABL Paydown	(994)
FILO Paydown	(125)
<b>Total 1L Paydown</b>	<b>(\$1,119)</b>

<sup>1</sup> The final Wave 4 GOB sales continue one week past the 13 week period ending 4/6/19

<sup>2</sup> Value excluded over time period includes: \$20mm from final week of GOB sale, \$174mm of normal course COGS, \$64mm of customer deposits, \$65mm of pledged receivables, and \$12mm of other

<sup>3</sup> NOLV calculated for the 13 week period represents blended average of wave 2, wave 3, and wave 4; due to the lower NOLV for the tail end of wave 2, blended NOLV during the time period is ~83%



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**PRIVILEGED AND CONFIDENTIAL – DRAFT FOR DISCUSSION PURPOSES – SUBJECT TO FRE 408**

# Wind Down Budget Weekly Cash Flows

(1 of 2)

Month	December					January					February				March					Total
Week	12	13	14	15	16	17	18	19	20	21	22	23	24	25						
Retail Week EoP	1/5/19	1/12/19	1/19/19	1/26/19	2/2/19	2/9/19	2/16/19	2/23/19	3/2/19	3/9/19	3/16/19	3/23/19	3/30/19	4/6/19						
Unique Week	201848	201849	201850	201851	201852	201901	201902	201903	201904	201905	201906	201907	201908	201909	13 - 25					
INVENTORY LIQUIDATION <sup>1</sup>																				
[1] GOB Sales Receipts	30	29	26	84	246	223	213	192	175	162	141	126	120	115	1,853					
[2] GOB Rent	0	(9)	0	0	0	(17)	(6)	0	0	(17)	(6)	0	0	(10)	(64)					
[3] GOB Addtl Expenses	0	(6)	(6)	(13)	(38)	(38)	(38)	(38)	(38)	(38)	(38)	(35)	(35)	(35)	(392)					
[4] GOB Liquidator Fees	0	0	0	0	(0)	0	0	0	(0)	0	0	0	(0)	0	(1)					
[5] Pharmacy Script Proceeds	0	13	0	13	0	13	0	13	0	13	6	0	0	0	70					
[6] External Augment Proceeds	0	0	0	0	1	1	1	1	1	1	0	0	0	0	6					
GOB Net Proceeds	\$30	\$27	\$20	\$84	\$210	\$182	\$171	\$168	\$138	\$120	\$105	\$92	\$85	\$71	\$1,473					
CASH RECEIPTS																				
[7] Normal Course Net Merchandise Receipts <sup>2</sup>	157	96	80	69	0	0	0	0	0	0	0	0	0	0	244					
[8] Plus: PA Sales	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3					
[9] Plus: Other Cash Receipts <sup>3</sup>	0	23	21	19	15	13	11	10	8	6	6	0	0	0	131					
[10] Plus: Non-Operating Receipts <sup>4</sup>	0	0	17	0	0	0	0	0	0	0	0	0	0	0	17					
[11] Plus: Sales Tax Receipts	0	12	10	14	21	19	18	16	15	13	12	10	10	9	178					
[12] Plus: TSA & CSA Receipts	0	0	0	0	0	0	1	1	1	2	2	2	2	2	10					
[13] Total Non-GOB Operating Receipts	\$157	\$130	\$128	\$102	\$36	\$32	\$30	\$27	\$23	\$21	\$19	\$12	\$11	\$11	\$584					
OPERATING DISBURSEMENTS																				
[14] Merchandise Vendors <sup>5</sup>	(58)	(40)	0	0	0	0	0	0	0	0	0	0	0	0	(40)					
[15] Rent & Occupancy	0	(2)	(2)	(2)	(2)	(2)	(2)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(20)					
[16] Corporate Retail Payroll <sup>6</sup>	(59)	(56)	(39)	(38)	(13)	(13)	(13)	(13)	(13)	(13)	(13)	(13)	(7)	(7)	(250)					
[17] Other SG&A Disbursements <sup>7</sup>	(38)	(47)	(40)	(45)	(30)	(35)	(21)	(24)	(22)	(23)	(21)	(21)	(21)	(22)	(372)					
[18] Sales Tax	0	0	0	(36)	0	0	(58)	0	0	(44)	0	0	(31)	0	(169)					
[19] Total Operating Disbursements	(\$156)	(\$145)	(\$81)	(\$121)	(\$46)	(\$50)	(\$94)	(\$38)	(\$35)	(\$81)	(\$35)	(\$35)	(\$60)	(\$30)	(\$852)					
[20] Less: CapEx <sup>8</sup>	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(14)					
[21] Net Cash Flow	\$30	\$11	\$66	\$64	\$199	\$163	\$106	\$156	\$124	\$59	\$88	\$67	\$36	\$51	\$1,191					

**PRIVILEGED AND CONFIDENTIAL – DRAFT FOR DISCUSSION PURPOSES – SUBJECT TO FRE 408**

# Wind Down Budget Weekly Cash Flows

(2 of 2)

Month	December	January					February				March					Total
Week	12	13	14	15	16	17	18	19	20	21	22	23	24	25		
Retail Week EoP	1/5/19	1/12/19	1/19/19	1/26/19	2/2/19	2/9/19	2/16/19	2/23/19	3/2/19	3/9/19	3/16/19	3/23/19	3/30/19	4/6/19		
Unique Week	201848	201849	201850	201851	201852	201901	201902	201903	201904	201905	201906	201907	201908	201909		13 - 25
<b>Net Cash Flow</b>	<b>\$30</b>	<b>\$11</b>	<b>\$66</b>	<b>\$64</b>	<b>\$199</b>	<b>\$163</b>	<b>\$106</b>	<b>\$156</b>	<b>\$124</b>	<b>\$59</b>	<b>\$88</b>	<b>\$67</b>	<b>\$36</b>	<b>\$51</b>		<b>\$1,191</b>
<b>NON-OPERATING CASH FLOW</b>																
[22] Utility Deposits	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
[23] Professional Fees <sup>9</sup>	(10)	0	0	0	(19)	0	0	0	(24)	0	0	0	0	0	(11)	(54)
[24] Critical Vendor Payments	(3)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
[25] Insurance Payments	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
[26] Gift Card Redemptions	0	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	0	0	0	0	0	0	(10)
[27] KEIP / KERF	0	0	(6)	0	0	0	0	0	0	0	0	0	0	0	0	(6)
[28] Credit Card Holdbacks	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
[29] PTO	0	0	0	0	(4)	0	0	0	(3)	0	0	0	0	0	0	(8)
[30] Severance	0	0	0	0	0	0	0	0	(14)	0	0	0	0	0	0	(14)
[31] 503(b)(9) <sup>10</sup>	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
[32] Warranty Refunds <sup>10</sup>	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
[33] Post-Petition AP	0	(43)	(39)	(24)	(11)	(10)	(3)	(5)	(2)	(2)	(1)	(0)	(0)	(0)	(0)	(140)
[34] KCD Payment	0	0	(17)	0	0	0	0	0	0	0	0	0	0	0	0	(17)
[35] Priority Tax Claims	0	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(27)
[34] Post-Petition TSA/CSA	0	0	0	0	0	0	(1)	(1)	(1)	(2)	(2)	(2)	(2)	(2)	(2)	(10)
[36] Chapter 11 Related	(\$13)	(\$46)	(\$66)	(\$27)	(\$38)	(\$13)	(\$7)	(\$9)	(\$48)	(\$6)	(\$5)	(\$4)	(\$4)	(\$14)		(\$286)
[37] Less: Cash Interest	(3)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(29)
[38] Less: Financing Fees	(3)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
[39] Total Other Non-Operating Disbursements	(\$6)	(\$2)	(\$2)	(\$2)	(\$2)	(\$2)	(\$2)	(\$2)	(\$2)	(\$2)	(\$2)	(\$2)	(\$2)	(\$2)		(\$29)
[40] Cash Flows Before Asset Sales (w/ Excess Proceeds)	\$10	(\$37)	(\$2)	\$35	\$159	\$148	\$104	\$144	\$74	\$51	\$81	\$62	\$30	\$34		\$883
[46] Total Asset Sales	\$0	\$0	\$21	\$0	\$0	\$0	\$216	\$27	\$16	\$115	\$0	\$17	\$8	\$7		\$428
[47] Wind-Down Reserve Funding	0	0	0	0	0	0	(50)	(27)	(16)	(66)	0	0	0	0		(159)
[48] Net Cash Flow Before Financing	\$10	(\$37)	\$20	\$35	\$159	\$148	\$263	\$144	\$74	\$100	\$81	\$79	\$38	\$41		\$1,145
[49] Financing	(45)	37	(20)	(35)	(159)	(148)	(263)	(144)	(74)	(100)	(81)	(29)	(8)	(7)		(1,030)
[50] Net Cash Flow	(\$35)	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$50	\$30	\$34		\$114
[51] Available Cash	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	49	80	114		114
[52] Net Availability	112	159	126	135	130	129	76	80	18	88	109	46	20	0		0
[53] Wind-down Reserve	81	81	81	81	81	81	131	158	174	240	240	240	240	240		240
[54] Total Liquidity (Availability + Cash + WDR)	\$193	\$240	\$207	\$216	\$210	\$210	\$207	\$238	\$192	\$328	\$349	\$336	\$339	\$354		\$354
Memo: Wind-down Reserve Balance <sup>11</sup>	81	81	81	81	81	81	131	158	174	240	240	240	240	240		240
Memo: Carve-Out Account	89	89	89	35	35	35	35	35	35	35	35	35	35	35		35
Memo: Sr. DIP & ABL Balance	994	932	912	823	664	516	413	269	194	43	0	0	0	0		0
Memo: FILO Balance	125	125	125	125	125	125	125	125	125	125	12	0	0	0		0
Memo: Jr. DIP Balance	75	175	175	175	175	175	175	175	175	226	301	284	276	269		269
Memo: Availability before Jr. DIP Draw	112	59	126	135	130	129	76	80	18	(12)	34	46	20	0		0



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# Supporting Schedules



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**PRIVILEGED AND CONFIDENTIAL – DRAFT FOR DISCUSSION PURPOSES – SUBJECT TO FRE 408**

## Key Assumptions – Operations

### ▪ Operating Receipts

- Cash receipts are assumed to be generated through the following channels during the wind-down period:
  - Sales of merchandise in the normal course in the weeks leading up to the GOBs
  - Continued service revenues (direct-to-consumer repair services, B2B repair, warranty commissions, etc.)
  - Continued non-operating receipts (pass-through and non-pass-through) such as Citi credit card accrued interest sharing, insurance proceeds, dividends from foreign subsidiaries and litigation recoveries
  - Asset sales including both encumbered and unencumbered collateral
- Same-store sales
  - Analysis assumes negative 15% same-store sales for all stores until the wind-down period begins on 1/15/19
  - Stores are assumed to maintain a 29% gross margin throughout the projection period, excluding GOBs, which are assumed to run at a net negative margin resulting in an ~90% Net Orderly Liquidation Value
    - The Wave 4 GOB sales includes \$6.6mm of proceeds from sharing the greater of 20% of sales and 40% of gross margin on \$30mm of augment at cost
  - All sales shown on a preliminary basis net of taxes, including sales taxes, pass-through, and royalties
- The wind-down analysis assumes 4 waves of GOBs
  - Wave 1: 142 Stores beginning 10/28/18 ending 1/6/19
  - Wave 2: 40 Stores beginning 11/18/18 ending 1/26/19
  - Wave 3: 80 Stores starting on 1/3/2019
  - Wave 4: 425 Stores starting on 1/24/2019
- Other Inflows
  - Minimal PA sales during GOB (\$200k per week)
  - Negative 15% YoY declines in Other Revenues, including Service Revenues

### ▪ Operating Disbursements

- COGS Disbursements
  - Merchandise vendors assumed to be primarily on cash-in-advance terms with 4-day average shipping time in the period leading up to the wind-down with some merch AP and non-merch AP based post-filing actuals;
    - Outstanding merchandise AP is assumed to be paid out during the case
  - Following the transition to the wind-down mode, no additional merchandise disbursements are made (last week of disbursements assumed to be the week ending 1/6/19, with no associated inventory receipts thereafter) and merchant teams are immediately rationalized other than a small number of key employees to oversee vendor relations
- SG&A Disbursements
  - Assumes all dark store leases are rejected immediately (Company rejected 234 leases on 10/16/18) and GOB leases are rejected at the end of the GOB sales period; as the last set of GOBs is projected to run from the week ending 1/26/19 to the week ending 4/13/19, lease payments would be paid on a per diem basis through the end of GOBs
  - Immediate RIF of non-core; non-key personnel beginning 1/15/19 – 60 days of WARN following RIF announcement
  - Uses the Company's detailed Payroll, Benefits, Non-Merch and Tax projection to project cost
    - Assumes logistics costs are right-sized to reflect lower store count
  - GOB store payroll and other expenses are removed at the end of the GOB sales
    - GOBs expected to last ~11 weeks in line with historical actuals
  - Capex assumes historical levels of maintenance with reductions in line with store closures, primarily to keep stores safe and compliant

**PRIVILEGED AND CONFIDENTIAL – DRAFT FOR DISCUSSION PURPOSES – SUBJECT TO FRE 408**

## Footnotes to Operating Budget

1. Inventory liquidation assumes 90% NOLV before proceeds from Pharmacy scripts or augment. Assumed shrink of 6%.
2. Normal course net merchandise receipts represent cash collected by stores prior to GOB period.
3. Other cash receipts include service businesses and other ancillary cash generating activities of the business (e.g. direct-to-consumer repair services, B2B repair, warranty commissions, vending, etc.)
4. Includes \$17mm ESL non-refundable deposit
5. Merchandise vendor payments for CIA goods assumed to cease immediately; however, payments for post-petition goods already received are shown to be paid in the line item for post-petition AP on page 5 (line item # 33)
6. Corporate retail payroll includes payroll expenses less GOB payroll
7. Other SG&A disbursements assumed to reduce steadily as the Company systematically shuts down it's functions and completes the GOB process for the brick & mortar stores as well as various asset sales
8. Capital expenditures are projected to be paid to the extent necessary to maintain safety and regulatory during a liquidation sale (i.e. repairing floors, ADA ramps, etc.); all capital expenditures assumed to be for maintenance purposes and estimates are preliminary; please see the Company's latest capital forecast provided as an addendum to this presentation for additional detail
9. Professional fees assumed to be paid from the carveout account established for such purpose which is currently funded with ~\$88mm, \$54mm assumed to be released during 13-week period ending 4/6/19
10. Claims arising under section 503(b)9 of the bankruptcy code as well as contingent claims related to the post-petition sale of protection agreements prior to the underwriting deal with Assurant are assumed to be paid from the wind down reserve at the end of the case
11. Wind down reserve is assumed to be fully funded with the proceeds of the previously unencumbered Jr. DIP collateral up to \$240mm and held until the conclusion of the case in order to be used to fund any residual administrative claims of the estate, unless otherwise noted

PRIVILEGED AND CONFIDENTIAL – DRAFT FOR DISCUSSION PURPOSES – SUBJECT TO FRE 408

# Wind Down Budget – Borrowing Base

Month	December	January					February				March				
Week	12	13	14	15	16	17	18	19	20	21	22	23	24	25	
Retail Week EoP	1/5/19	1/12/19	1/19/19	1/26/19	2/2/19	2/9/19	2/16/19	2/23/19	3/2/19	3/9/19	3/16/19	3/23/19	3/30/19	4/6/19	
Unique Week	201848	201849	201850	201851	201852	201901	201902	201903	201904	201905	201906	201907	201908	201909	
<b>Inventory Roll</b>															
Beginning Inventory	\$1,899	\$1,829	\$1,740	\$1,663	\$1,562	\$1,348	\$1,198	\$1,048	\$898	\$748	\$597	\$447	\$307	\$169	
Plus: Merchandise Receipts	76	0	0	0	0	0	0	0	0	0	0	0	0	0	
Less: GOB Wave 1 COGS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
Less: GOB Wave 2 COGS	0	(9)	(8)	0	0	0	0	0	0	0	0	0	0	0	
Less: GOB Wave 3 COGS	0	(12)	(12)	(12)	(12)	(12)	(12)	(12)	(12)	(12)	(12)	(2)	0	0	
Less: GOB Wave 4 COGS	0	0	0	(39)	(138)	(138)	(138)	(138)	(138)	(138)	(138)	(138)	(138)	(138)	
Less: Merchandise COGS	(146)	(68)	(57)	(49)	0	0	0	0	0	0	0	0	0	0	
Less: Deposit Fulfillment	0	0	0	0	(64)	0	0	0	0	0	0	0	0	0	
Less: Other	0	0	0	0	0	0	0	0	0	0	0	0	0	(12)	
Ending Inventory	\$1,829	\$1,740	\$1,663	\$1,562	\$1,348	\$1,198	\$1,048	\$898	\$748	\$597	\$447	\$307	\$169	\$19	
<b>BB Calculation</b>															
In-transit Reserve	(\$45)	(\$99)	(\$88)	(\$91)	(\$77)	(\$63)	(\$61)	(\$51)	(\$40)	\$0	\$0	\$0	\$0	\$0	
Ineligible Reserve	(118)	(62)	(66)	(63)	(61)	(56)	(47)	(38)	(28)	0	0	0	0	0	
GOB Reserve	(87)	(13)	(6)	(3)	(9)	(62)	(121)	(168)	(211)	(239)	(256)	(206)	(143)	(19)	
Decon to DC	3	3	5	3	3	2	2	2	2	1	1	0	0	0	
SRAC LC In-Transit	4	4	4	4	4	3	4	3	3	2	2	2	1	0	
Total Ineligible Inventory	(\$243)	(\$167)	(\$151)	(\$149)	(\$138)	(\$176)	(\$224)	(\$251)	(\$274)	(\$236)	(\$253)	(\$204)	(\$142)	(\$19)	
<b>Net Eligible Inventory</b>	<b>\$1,585</b>	<b>\$1,573</b>	<b>\$1,512</b>	<b>\$1,414</b>	<b>\$1,210</b>	<b>\$1,022</b>	<b>\$824</b>	<b>\$646</b>	<b>\$473</b>	<b>\$362</b>	<b>\$194</b>	<b>\$103</b>	<b>\$27</b>	<b>\$0</b>	
Adj. NOLV %	81.4%	81.4%	81.4%	81.4%	83.0%	83.0%	83.0%	83.0%	83.0%	83.0%	83.0%	83.0%	83.0%	83.0%	
NOLV of Net Eligible Inventory	\$1,291	\$1,280	\$1,231	\$1,151	\$1,004	\$849	\$684	\$536	\$393	\$300	\$161	\$86	\$23	\$0	
87.5% Advance Rate	87.5%	87.5%	87.5%	87.5%	87.5%	87.5%	87.5%	87.5%	87.5%	87.5%	87.5%	87.5%	87.5%	87.5%	
NOLV of Net Eligible Inv. Multiplied by 87.5% Advance Rate	\$1,129	\$1,120	\$1,077	\$1,007	\$879	\$742	\$599	\$469	\$344	\$263	\$141	\$75	\$20	\$0	
<b>Inventory Contribution to Borrowing Base</b>	<b>\$1,129</b>	<b>\$1,120</b>	<b>\$1,077</b>	<b>\$1,007</b>	<b>\$879</b>	<b>\$742</b>	<b>\$599</b>	<b>\$469</b>	<b>\$344</b>	<b>\$263</b>	<b>\$141</b>	<b>\$75</b>	<b>\$20</b>	<b>\$0</b>	
<b>Other Borrowing Base Components</b>															
Credit Card Receivables Net (87.5% Advance Rate)	50	33	28	24	0	0	0	0	0	0	0	0	0	0	
Pharmacy Receivables Net (87.5% Advance Rate)	7	4	3	3	0	0	0	0	0	0	0	0	0	0	
Availability Reserve	(56)	(42)	(40)	(38)	(33)	(29)	(25)	(22)	(18)	(14)	(11)	(7)	0	0	
Carveout Reserve	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	0	0	
<b>Borrowing Base</b>	<b>\$1,108</b>	<b>\$1,094</b>	<b>\$1,046</b>	<b>\$974</b>	<b>\$825</b>	<b>\$692</b>	<b>\$562</b>	<b>\$426</b>	<b>\$304</b>	<b>\$227</b>	<b>\$109</b>	<b>\$46</b>	<b>\$20</b>	<b>\$0</b>	
<i>(Sum of Inventory Contribution and Other Components)</i>															
LTV Covenant Calculation	79.1%	84.7%	86.8%	85.3%	84.0%	81.5%	85.4%	81.4%	91.3%	68.1%	27.3%	33.7%	0.0%	0.0%	
<b>Debt Outstanding</b>															
DIP / ABL	(\$994)	(\$932)	(\$912)	(\$823)	(\$664)	(\$516)	(\$413)	(\$269)	(\$194)	(\$43)	\$--	\$--	\$--	\$--	
Holdback	--	--	--	--	--	--	--	--	--	--	--	--	--	--	
FILO Pushdown	(2)	(3)	(8)	(16)	(31)	(46)	(63)	(78)	(92)	(95)	--	--	--	--	
<b>Pro Forma Available to Borrow under ABL</b>	<b>\$112</b>	<b>\$159</b>	<b>\$126</b>	<b>\$135</b>	<b>\$130</b>	<b>\$129</b>	<b>\$76</b>	<b>\$80</b>	<b>\$18</b>	<b>\$88</b>	<b>\$109</b>	<b>\$46</b>	<b>\$20</b>	<b>\$0</b>	
FILO Outstanding	(125)	(125)	(125)	(125)	(125)	(125)	(125)	(125)	(125)	(125)	(12)	0	0	0	
<b>FILO Cushion / Surplus (at 15%)</b>	<b>(\$2)</b>	<b>(\$3)</b>	<b>(\$8)</b>	<b>(\$16)</b>	<b>(\$31)</b>	<b>(\$46)</b>	<b>(\$63)</b>	<b>(\$78)</b>	<b>(\$92)</b>	<b>(\$95)</b>	<b>\$4</b>	<b>\$9</b>	<b>\$2</b>	<b>\$0</b>	
<b>Total Pro Forma Availability to Borrow</b>	<b>\$112</b>	<b>\$159</b>	<b>\$126</b>	<b>\$135</b>	<b>\$130</b>	<b>\$129</b>	<b>\$76</b>	<b>\$80</b>	<b>\$18</b>	<b>\$88</b>	<b>\$109</b>	<b>\$46</b>	<b>\$20</b>	<b>\$0</b>	



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9

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JX 134-9

**PRIVILEGED AND CONFIDENTIAL – DRAFT FOR DISCUSSION PURPOSES – SUBJECT TO FRE 408**

# Wind Down Budget – Debt Schedule

Month	December	January					February				March			
Week	12	13	14	15	16	17	18	19	20	21	22	23	24	25
Retail Week EoP	1/5/19	1/12/19	1/19/19	1/26/19	2/2/19	2/9/19	2/16/19	2/23/19	3/2/19	3/9/19	3/16/19	3/23/19	3/30/19	4/6/19
Unique Week	201848	201849	201850	201851	201852	201901	201902	201903	201904	201905	201906	201907	201908	201909
<b>Structure Summary</b>														
<b>Junior DIP</b>														
Junior DIP DD Term Loan	75.0	175.0	175.0	175.0	175.0	175.0	175.0	175.0	175.0	225.8	300.8	283.5	275.6	268.7
Total Jr. DIP	\$75.0	\$175.0	\$175.0	\$175.0	\$175.0	\$175.0	\$175.0	\$175.0	\$175.0	\$225.8	\$300.8	\$283.5	\$275.6	\$268.7
<b>Total DIP</b>														
Pre-Rollup Senior DIP Term Loan	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
New Revolver	452	390	410	321	282	134	152	8	73	0	0	0	0	0
Prepetition ABL Revolver	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Term Loan B	0	0	0	0	0	0	0	0	0	0	0	0	0	0
New Term Loan	424	424	384	384	264	264	142	142	69	43	0	0	0	0
ABL Normal Course LC	119	119	119	119	119	119	119	119	52	0	0	0	0	0
Total DIP & ABL 1L Credit Outstanding	\$994	\$932	\$912	\$823	\$664	\$516	\$413	\$269	\$194	\$43	\$0	\$0	\$0	\$0
<b>Other 1L &amp; 1.5L Credit</b>														
ESL/Citi LC	\$271	\$271	\$271	\$271	\$271	\$271	\$271	\$271	\$271	\$271	\$271	\$271	\$271	\$271
FILO	125	125	125	125	125	125	125	125	125	125	12	0	0	0
Total Other 1L Credit Outstanding	\$396	\$396	\$396	\$396	\$396	\$396	\$396	\$396	\$396	\$396	\$283	\$271	\$271	\$271
<b>Senior Real Estate Debt</b>														
Dove Loans	\$108	\$108	\$108	\$108	\$108	\$108	\$108	\$108	\$108	\$108	\$108	\$108	\$108	\$108
Sparrow Loans	615	615	615	615	615	615	615	615	615	615	615	615	615	615
Total 1L Real Estate Debt Outstanding	\$723	\$723	\$723	\$723	\$723	\$723	\$723	\$723	\$723	\$723	\$723	\$723	\$723	\$723
<b>Total Interest Expense</b>														
Senior DIP Cash Interest	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
1st Lien Cash Interest	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Real Estate Cash Interest	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Total Cash Interest	\$2	\$2	\$2	\$2	\$2	\$2	\$2	\$2	\$2	\$2	\$2	\$2	\$2	\$2

# **Exhibit 95**



SEARS HOLDINGS



SUBJECT TO FRE 408; CONFIDENTIAL; DRAFT FOR DISCUSSION PURPOSES ONLY AND SUBJECT TO CHANGE

# Project Blue

## Actuals From Week ended January 26 through February 9

5/13/19



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SUBJECT TO FRE 408; CONFIDENTIAL; DRAFT FOR DISCUSSION PURPOSES ONLY AND SUBJECT TO CHANGE

## Actuals For 3 Weeks Prior to Close

Retail Month		January		February	Total
Budget Week		15	16	17	15 - 17
Forecast / Actual		ACT	ACT	ACT	ACT
Week Ending		1/26/19	2/2/19	2/9/19	2/9/19
Retail Week		201851	201852	201901	
<b>CASH RECEIPTS</b>					
[1]	<b>Total Cash Receipts</b>	<b>\$116</b>	<b>\$133</b>	<b>\$150</b>	<b>\$399</b>
<b>OPERATING DISBURSEMENTS</b>					
[2]	Merchandise Vendors	(\$61)	(\$54)	(\$8)	(\$123)
[3]	Occupancy	0	0	(27)	(27)
[4]	Payroll, Taxes, and Benefits	(32)	(49)	(33)	(113)
[5]	Other SG&A Disbursements	(57)	(57)	(30)	(144)
[6]	GOB Rent	0	0	0	0
[7]	GOB Additional Expenses / Benefit	0	0	0	0
	<b>Total Operating Disbursements</b>	<b>(\$150)</b>	<b>(\$160)</b>	<b>(\$98)</b>	<b>(\$408)</b>
[8]	CapEx	(1)	(0)	0	(1)
	<b>Net Operating Cash Flow</b>	<b>(\$35)</b>	<b>(\$28)</b>	<b>\$52</b>	<b>(\$11)</b>
<b>NON-OPERATING CASH FLOW</b>					
[9]	Utility Deposits	\$0	\$0	\$0	\$0
[10]	Professional Fees	(1)	(6)	(1)	(7)
[11]	KEIP / KERP	0	(3)	0	(3)
	<b>Chapter 11 Related Disbursements</b>	<b>(\$1)</b>	<b>(\$8)</b>	<b>(\$1)</b>	<b>(\$10)</b>
[12]	Cash Interest	(\$2)	(\$4)	(\$5)	(\$11)
[13]	Financing Fees	0	0	0	0
	<b>Other Non-Operating Disbursements</b>	<b>(\$2)</b>	<b>(\$4)</b>	<b>(\$5)</b>	<b>(\$11)</b>
	<b>Net Cash Flow Before Financing</b>	<b>(\$38)</b>	<b>(\$41)</b>	<b>\$47</b>	<b>(\$32)</b>
[14]	Financing	(145)	51	(42)	(135)
	<b>Net Cash Flow</b>	<b>(\$182)</b>	<b>\$10</b>	<b>\$5</b>	<b>(\$167)</b>
	Available Cash	\$0	\$8	\$0	\$0
	Net Availability Before Buyer Financing	164	115	84	84
[15]	Buyer Financing	0	0	0	0
[16]	<b>Memo: Total Liquidity (Availability + Cash)</b>	<b>\$164</b>	<b>\$123</b>	<b>\$84</b>	<b>\$84</b>
[17]	Memo: Wind-down Account - Restricted Cash	\$88	\$88	\$88	\$88
[18]	Memo: Carve-Out Account - Restricted Cash	\$107	\$109	\$120	\$120
[19]	Memo: Sr. DIP & 1L Balance	\$841	\$892	\$850	\$850
[20]	Memo: Jr DIP Balance	\$350	\$350	\$350	\$350

# **Exhibit 96**

PRIVILEGED AND HIGHLY CONFIDENTIAL; SUBJECT TO FRE 408; DRAFT MATERIALS FOR DISCUSSION PURPOSES

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# SEARS HOLDINGS

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ADMIN SOLVENCY TRACKER AND BUDGET UPDATE

July 10, 2019



JX 136-1

PRIVILEGED AND HIGHLY CONFIDENTIAL; SUBJECT TO FRE 408; DRAFT MATERIALS FOR DISCUSSION PURPOSES

## Admin Solvency Tracker

Under the closing estimates, the Company is projecting a ~\$7mm administrative surplus; the Company has identified ~\$34mm of potential mitigating items that provide additional cushion

Sears Holdings Corporation  
Administrative Solvency Tracker  
Dated: 7/08/2019

Base Case w/ Mitigating Items

Downside Case

Admin & Other Priority Claims Uses of Value									
	Actual	Forecast	Total	Transform Liabilities	Base Case	Mitigating Items	Mitigated Scenario		
<b>Admin Claims</b>									
(1) 503(b)9	\$ -	\$ 181	\$ 181	\$ (139)	\$ (42)	\$ 5	\$ (37)	\$ -	\$ (42)
(2) Accounts Payable	-	180	180	(166)	(14)	-	(14)	-	(14)
(3) Accrued Payroll	\$42	-	42	-	(42)	-	(42)	-	(42)
(4) GOB Expense	26	-	26	-	(26)	-	(26)	-	(26)
(5) Accrued Sales Tax	20	-	20	-	(20)	-	(20)	-	(20)
(6) Severance, WARN, and EE Claims	11	1	13	(13)	-	-	-	-	-
(7) Franchise Taxes	1	2	3	-	(3)	-	(3)	-	(3)
(8) Net TSA	-	1	1	-	(1)	-	(1)	-	(1)
(9) US Trustee Fees	2	1	3	-	(3)	-	(3)	-	(3)
(10) Board Fees	1	1	2	-	(2)	-	(2)	-	(2)
(11) RemainCo Winddown Costs	86	30	117	-	(117)	-	(117)	-	(117)
(12) Professional Fees	72	-	72	-	(72)	-	(72)	-	(72)
(13) Net Prepaid Inventory Shortfall	-	-	-	55	(55)	-	(55)	-	(55)
(14) Disputed Items	-	-	-	-	-	-	-	(67)	(67)
(15) Other Potential Liabilities	-	10	10	-	(10)	-	(10)	-	(10)
<b>Total</b>	<b>261</b>	<b>407</b>	<b>669</b>	<b>(263)</b>	<b>(406)</b>	<b>5</b>	<b>(401)</b>	<b>(67)</b>	<b>(473)</b>
<b>Assets</b>									
(16) Professional Fee Carve-Out Account	\$ 72	\$ -	\$ 72	\$ -	\$ 72	\$ -	\$ 72	\$ -	\$ 72
(17) MTN Notes	81	-	81	-	81	-	81	-	81
(18) U-HAUL	7	-	7	-	7	-	7	-	7
(19) SHIP Security Deposit	5	-	5	-	5	-	5	-	5
(20) GOB Inventory Gross	59	9	69	-	69	-	69	-	69
(21) ESL Payment at Close	35	-	35	-	35	-	35	-	35
(22) Cash in Stores	9	-	9	-	9	-	9	-	9
(23) Utility Deposit	-	10	10	-	10	-	10	-	10
(24) Cash in Transit at Close	12	20	32	-	32	-	32	-	32
(25) Credit Card Receivables	15	0	15	-	15	-	15	-	15
(26) Israel Cash	3	-	3	-	3	-	3	-	3
(27) Pro-Rated Rent	5	11	16	-	16	-	16	-	16
(28) Specified Receivables	-	-	-	-	-	17	17	-	-
(29) Residual Real Estate	17	21	37	-	37	3	40	-	37
(30) Excess Inventory Proceeds	-	6	6	-	6	-	6	(6)	-
(31) Calder Sculpture	-	4	4	-	4	6	10	-	4
(32) Hoffman Estates Tax Credit	3	3	6	-	6	4	10	-	6
(33) Other Cash Accounts	4	-	4	-	4	-	4	(4)	(0)
(34) Other Proceeds	2	-	2	-	2	-	2	-	2
(35) Avoidance Actions	-	-	-	-	-	-	-	-	-
<b>Total</b>	<b>327</b>	<b>85</b>	<b>413</b>	<b>-</b>	<b>413</b>	<b>30</b>	<b>442</b>	<b>(10)</b>	<b>403</b>
<b>Solvency / (Gap)</b>	<b>\$ 66</b>				<b>\$ 7</b>	<b>\$ 34</b>	<b>\$ 41</b>	<b>\$ (77)</b>	<b>\$ (70)</b>

PRIVILEGED AND HIGHLY CONFIDENTIAL; SUBJECT TO FRE 408; DRAFT MATERIALS FOR DISCUSSION PURPOSES

## Admin Solvency Tracker (cont'd)

### Notes:

- (1) Reflects maximum estimate of \$181mm of 503(b)(9) claims with potential for reduction of \$5mm through claims reconciliation
- (2) Revised to reflect latest estimate of 2/10/19 closing AP of \$180mm
- (3) All accrued payroll liabilities have been satisfied
- (4) GOB Expense reflects GOB Payroll and GOB Rent; all GOB expenses from week 9 – week 11 assumed to be severance
- (5) All accrued sales tax liabilities as of close have been satisfied, however the estate will still owe residual sales taxes on GOB activity post-close
- (6) Assumes Transform will pay severance per APA; all GOB expenses from week 9 – week 11 assumed to be severance
- (7) Franchise tax estimates provided by Company and reflect franchise tax payments in jurisdictions that assess franchise taxes
- (8) Net cost of transition service agreements
- (9) Reflects fees payable to the U.S. Trustee
- (10) Fees payable to board members in consideration for services
- (11) Costs to wind down remainder of estate
- (12) Updated to reflect latest professional fee carveout estimate
- (13) Prepaid Inventory Shortfall estimated at \$63mm, offset by \$8mm of excess Warranty Receivables
- (14) Disputed items reflect \$50mm placeholder to account for risk of specified receivables shortfall and \$17mm reflecting 50% of the difference between the estate's estimate of the Prepaid Inventory Shortfall amount and Transform's estimate of the Prepaid Inventory Shortfall amount
- (15) \$10mm of estimated Other Potential Liabilities subject to continued review and analysis by counsel
- (16) Updated to reflect latest professional fee carveout estimate
- (17) Net proceeds from MTN note sale, cash held in wind down account
- (18) Net proceeds earmarked for wind down account from sale of unencumbered properties to U-HAUL, cash held in wind down account
- (19) Refund of SHIP deposit by Service.com, cash held in wind down account
- (20) The estate has realized \$59mm of gross recovery and expect an additional \$9mm as part of cash reconciliation
- (21) Credit bid release payment by ESL of \$35mm
- (22) Post-close payment by ESL of \$9mm for cash in stores which was paid the week of close
- (23) Assumes return of \$10mm utility deposit to estate
- (24) Includes \$12mm of cash in regional banks and \$20mm of cash in transit currently being withheld by Transform
- (25) Received \$13.3mm from First Data on 6/7/19 and \$1.3mm from Amex on 6/26; Remaining \$0.4mm represents excess credit card receivables from pre-close activity being withheld by Transform
- (26) Cash in transit payment of \$3mm from Transform related to transfer of cash from Israeli subsidiary
- (27) Rent proration payment as a result of occupancy expense proration; currently being withheld by Transform
- (28) Assumes 50% collection of excess book value of Specified Receivables of \$34mm as potential mitigating item
- (29) Reflects estimated sale value of residual real estate not acquired by Transform
- (30) Reflects 90% recovery on excess inventory delivered at close, stemming from delivery of \$1.664bn of collateral vs. \$1.657bn requirement
- (31) Includes \$4mm estimate for \$15mm - \$25mm Calder sculpture (subject to ongoing litigation)
- (32) Represents \$6mm Hoffman estates tax credit refund
- (33) Includes cash in Luxottica account, consignment reserve account, and Sparrow Holding account
- (34) Various other vendor proceeds
- (35) Preference firms still conducting diligence related to potential preference recoveries



PRIVILEGED AND HIGHLY CONFIDENTIAL; SUBJECT TO FRE 408; DRAFT MATERIALS FOR DISCUSSION PURPOSES

## Weekly Cash Flow Budget – Base Case

Retail Month	February				March				April				May				June				July				August				Sep	Oct	Nov	Dec.	Total																																
Budget Week	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29																																				
Forecast / Actual	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	ACT	FCST	FCST	FCST	FCST	FCST	FCST	FCST	FCST																																				
Week Ending	2/16	2/23	3/2	3/9	3/16	3/23	3/30	4/6	4/13	4/20	4/27	5/4	5/11	5/18	5/25	6/1	6/8	6/15	6/22	6/29	7/6	7/13	7/20	7/27	8/3	8/10	8/17	8/24	8/31																																				
CASH RECEIPTS																																																																	
Wave 3 GOB Inflows	\$5	\$17	\$14	\$11	\$9	\$2	\$0	\$0	(\$0)	\$0	\$0	(\$0)	\$0	\$0	(\$0)	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$69																															
Cash In Transit Proceeds	9	-	-	-	-	-	3	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	20	-	-	-	-	-	-	-	32																																
Cash from Israel	-	-	-	-	3	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	3																																
Credit Card Receivables	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	13	-	-	1	-	0	-	-	-	-	-	-	-	-	-	-	15																																
Cash In Stores	9	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	9																																
Real Estate Asset Sales	-	4	5	-	-	-	-	-	3	-	2	2	-	-	-	-	1	-	0	-	-	1	-	-	19	-	-	-	-	-	-	-	37																																
Excess Inventory Proceeds	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	6	-	-	-	-	-	-	-	6																																
ESL Closing Proceeds	35	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	35																																
TSA Proceeds	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0	0	-	-	-	-	-	-	-	-	1																																
SHIP Deposit	-	-	-	5	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	5																																
Utility Deposit	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	10	-	-	-	-	-	-	-	-	10																																
Hoffman Estates Tax Credit	-	-	-	-	-	-	-	-	-	-	-	-	-	3	-	-	-	-	-	-	-	-	3	-	-	-	-	-	-	-	-	-	6																																
Calder Statue	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	4	-	-	-	-	4																																
Pro-Rated Rent	-	-	-	-	-	-	5	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	11	-	-	-	-	-	-	-	16																																
ESL Severance Assumption <sup>(1)</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	13	-	-	13																																
ESL 503b9 Assumption	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	139	-	139																																
Other Proceeds	-	-	-	-	-	-	-	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2																																
Total OldCo Receipts	\$58	\$22	\$19	\$15	\$13	\$2	\$8	\$0	\$3	\$0	\$2	\$2	\$0	\$3	\$1	\$0	\$15	\$0	\$0	\$1	\$0	\$2	\$0	\$14	\$66	\$-	\$-	\$-	\$-	\$4	\$-	\$152	\$-	\$-	\$401																														
CASH DISBURSEMENTS																																																																	
OldCo Accrued Payroll & Benefits	(\$29)	(\$14)	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	(\$42)																																
Taxes	-	(5)	-	-	(0)	(4)	-	-	(0)	(0)	(0)	(2)	-	-	(0)	(0)	(0)	(0)	-	-	-	(1)	-	-	-	-	-	-	-	-	-	-	(20)																																
GOB Operating Costs <sup>(1)</sup>	-	-	(6)	(6)	(3)	(1)	(3)	(4)	-	-	-	(3)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(26)																																
Professional Fee Cane Out Funding <sup>(2)</sup>	-	-	(20)	-	(15)	-	(7)	-	-	-	-	-	-	(19)	(1)	(8)	-	(2)	(2)	-	(4)	(6)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(6)	(5)	-	(107)																																
Post-Petition Payables	-	-	-	-	-	-	(1)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(13)	-	-	-	-	-	-	-	(14)																																
503(b)(9) Claims	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(181)	-	(181)																																
TSA Disbursements	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(1)	-	-	-	-	-	-	-	-	-	(1)																																
Franchise Tax	-	-	-	(0)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(2)	-	-	-	-	-	-	-	(3)																																
Severance & WARN	-	-	-	-	-	(1)	-	-	(1)	(1)	(8)	-	-	-	-	-	(0)	(0)	(0)	-	-	-	(1)	-	-	-	-	-	-	-	-	-	(13)																																
US Trustee Fees	-	-	-	-	-	-	-	-	-	-	-	(0)	(2)	-	-	-	-	-	-	-	-	-	-	-	(1)	-	-	-	-	-	(1)	-	(3)																																
Board Fees	-	-	-	(0)	-	(0)	-	(0)	(0)	-	-	-	-	-	-	-	-	(0)	-	-	-	(0)	(1)	-	(0)	-	(0)	(0)	(0)	(0)	(0)	(0)	(2)																																
Net Prepaid Inventory Shortfall	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(55)	-	(55)																																
Other Potential Liabilities	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(10)	-	-	-	-	-	-	(10)																																
Other Liabilities and Expenses	(1)	(0)	(0)	-	(0)	(1)	-	(0)	(3)	(1)	-	(1)	(0)	(1)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	-	-	-	-	-	-	-	-	-	-	(9)																																
Total OldCo Disbursements	(\$29)	(\$19)	(\$33)	(\$6)	(\$18)	(\$7)	(\$10)	(\$4)	(\$4)	(\$2)	(\$9)	(\$6)	(\$2)	(\$20)	(\$2)	(\$8)	(\$0)	(\$3)	(\$3)	(\$0)	(\$5)	(\$11)	(\$2)	(\$3)	(\$25)	(\$2)	(\$2)	(\$2)	(\$2)	(\$6)	(\$241)	(\$0)	(\$0)	(\$486)																															
PASS-THROUGH RECEIPTS																																																																	
NewCo Payroll Remittance	\$5	\$11	\$26	\$23	\$28	\$24	\$27	\$23	\$23	\$29	\$25	\$33	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$276																																
NewCo Licensing Remittance	5	3	3	3	3	4	4	3	3	3	4	4	3	4	5	3	4	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	104																																
Total Pass-Through Receipts	\$10	\$14	\$29	\$26	\$31	\$27	\$31	\$26	\$26	\$32	\$29	\$37	\$3	\$4	\$5	\$3	\$4	\$3	\$3	\$3	\$3	\$3	\$3	\$3	\$3	\$3	\$3	\$3	\$3	\$3	\$3	\$3	\$380																																
PASS-THROUGH DISBURSEMENTS																																																																	
NewCo Payroll	(\$5)	(\$11)	(\$26)	(\$23)	(\$28)	(\$24)	(\$27)	(\$23)	(\$23)	(\$29)	(\$25)	(\$33)	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	(\$276)																																
Licensing Payments For NewCo	(5)	(3)	(3)	(3)	(3)	(4)	(4)	(3)	(3)	(4)	(4)	(3)	(4)	(3)	(4)	(5)	(3)	(4)	(3)	(3)	(3)	(3)	(3)	(3)	(3)	(3)	(3)	(3)	(3)	(3)	(3)	(3)	(104)																																
Total Pass-Through Disbursements	(\$10)	(\$14)	(\$29)	(\$26)	(\$31)	(\$27)	(\$31)	(\$26)	(\$26)	(\$32)	(\$29)	(\$37)	(\$3)	(\$4)	(\$5)	(\$3)	(\$4)	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)	(\$380)																																
Net Cash Flow																																	28	2	(14)	9	(5)	(5)	(2)	(4)	(1)	(2)	(6)	(5)	(2)	(17)	(1)	(8)	15	(3)	(3)	1	(4)	(9)	(2)	11	41	(2)	(2)	(2)	2	(6)	(89)	(0)	(85)
Beginning Available Cash	\$92	\$120	\$123	\$108	\$117	\$112	\$107	\$105	\$101	\$100	\$98	\$92	\$87	\$85	\$88	\$67	\$59	\$74	\$71	\$68	\$69	\$65	\$56	\$54	\$66	\$106	\$104	\$102	\$100	\$102	\$96	\$7	\$7	\$92																															
Change In Available Cash	28	2	(14)	9	(5)	(5)	(2)	(4)	(1)	(2)	(6)	(5)	(2)	(17)	(1)	(8)	15	(3)	(3)	1	(4)	(9)	(2)	11	41	(2)	(2)	(2)	2	(6)	(89)	(0)	(0)	(85)																															
Ending Available Cash	\$120	\$123	\$108	\$117	\$112	\$107	\$105	\$101	\$100	\$98	\$92	\$87	\$85	\$88	\$67	\$59	\$74	\$71	\$68	\$69	\$65	\$56	\$54	\$66	\$106	\$104	\$102	\$100	\$102	\$96	\$7	\$7	\$7																																
ENDING CASH BALANCES																																																																	
OldCo Operating Accounts	\$28	\$31	\$16	\$21	\$15	\$11	\$9	\$5	\$11	\$9	\$0	\$9	\$7	\$5	\$5	\$4	\$3	\$17	\$14	\$11	\$13	\$8	\$-	\$-	\$11	\$33	\$31	\$29	\$22	\$22	\$22	\$-	\$-	\$-																															
Consignment Accounts	4	4	4	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5	5	4	4	4	4	4	4	4	4	4	4	4	4	4	4																																
Wind-Down Account	88	88	88	93	93	93	93	86	86	88	74	74	69	59	51	53	53	53	53	52	51	51	70	70	70	70	70	70	70	70	70	70	70																																
Professional Fee Cane Out Account	111	105	109	105	114	100	96	92	89	84	66	61	54	67	68	73	72	73	69	68	72	74	73	72	71	70	69	68	67	61	-	-	-																																
Total Cash	\$231	\$227	\$217	\$222	\$226	\$200	\$201	\$194	\$190	\$183	\$156	\$149	\$139	\$136	\$132	\$147	\$144	\$138	\$137	\$137	\$137	\$131	\$128	\$138	\$178	\$175	\$172	\$168	\$169	\$157	\$7	\$7	\$7																																

PRIVILEGED AND HIGHLY CONFIDENTIAL; SUBJECT TO FRE 408; DRAFT MATERIALS FOR DISCUSSION PURPOSES

## Professional Fee Details

Period:	Feb-19 Total	Mar-19 Total	Apr-19 Total	May-19 Total (a)	Jun-19 Total	Jul-19 Total	Aug-19 Total	Sep-19 Total	Oct-19 Total	Feb - Oct Total
<b>Estate Professionals</b>										
Weil, Gotshal & Manges	\$8,650,000	\$4,300,000	\$5,150,000	\$5,300,000	\$3,800,000	\$4,000,000	\$3,000,000	\$1,250,000	\$1,250,000	\$36,700,000
M-III Advisory Partners	2,666,667	2,500,000	3,000,000	(1,250,000)	1,200,000	1,200,000	1,000,000	750,000	750,000	11,816,667
Lazard	200,000	200,000	200,000	(1,713,605)	-	100,000	100,000	-	-	(913,605)
Wachtell	137,500	150,000	-	(1,676,482)	-	-	-	-	-	(1,388,982)
McAndrews	-	-	5,000	-	-	5,000	5,000	5,000	5,000	25,000
A&G Realty Partners	100,000	-	-	-	-	-	-	-	-	100,000
JLL	1,375,750	30,000	30,000	299,655	-	-	-	-	-	1,735,405
D&T (BK)	1,195,820	516,041	609,099	870,670	448,904	300,000	150,000	-	-	4,090,534
D&T (Audit)	315,000	2,270,201	-	-	-	-	-	-	-	2,585,201
D&T (Tax)	321,477	3,813,855	546,754	272,500	62,171	-	-	-	-	5,016,757
Prime Clerk	3,033,393	709,487	4,113,861	2,585,755	1,548,769	500,000	200,000	1,640,000	510,000	14,841,264
Public Relations	15,000	-	-	-	-	-	-	-	-	15,000
Ballard Spahr	-	-	-	400,000	200,000	400,000	400,000	400,000	-	1,800,000
Litigation Legal Fees	-	-	-	-	-	-	-	2,200,000	2,200,000	4,400,000
<b>Total Estate Professionals</b>	<b>18,010,606</b>	<b>14,489,584</b>	<b>13,654,714</b>	<b>5,088,493</b>	<b>7,259,844</b>	<b>6,505,000</b>	<b>4,855,000</b>	<b>6,245,000</b>	<b>4,715,000</b>	<b>80,823,241</b>
<b>Restructuring Comm. Prof.</b>										
Paul Weiss	2,097,977	1,046,554	1,184,859	1,297,306	1,517,891	1,250,000	1,250,000	-	-	9,644,588
Evercore	216,667	200,000	200,000	200,000	162,500	50,000	50,000	-	-	1,079,167
Alvarez & Marsal	190,000	3,000	504,000	76,000	75,000	75,000	75,000	-	-	998,000
Young Conaway	16,500	5,500	30,000	139,934	8,600	-	-	-	-	200,534
Stout Risius Ross	2,056	2,000	10,500	178,915	10,828	-	-	-	-	204,298
<b>Total Restr. Comm. Prof.</b>	<b>2,523,200</b>	<b>1,257,054</b>	<b>1,929,359</b>	<b>1,892,155</b>	<b>1,774,819</b>	<b>1,375,000</b>	<b>1,375,000</b>	<b>-</b>	<b>-</b>	<b>12,126,587</b>
<b>Creditor Committee Prof.</b>										
Akin Gump	3,250,000	1,450,000	1,400,000	3,002,845	1,475,000	1,475,000	1,250,000	-	-	13,302,845
Houlihan Lokey	500,000	500,000	275,000	275,000	(423,381)	125,500	125,500	-	-	1,377,619
FTI Consulting	461,667	561,000	284,000	584,000	136,000	275,000	275,000	-	-	2,576,667
Herrick, Feinstein	-	-	-	-	384,401	-	-	-	-	384,401
<b>Total Creditor Comm. Prof.</b>	<b>4,211,667</b>	<b>2,511,000</b>	<b>1,959,000</b>	<b>3,861,845</b>	<b>1,572,020</b>	<b>1,875,500</b>	<b>1,650,500</b>	<b>-</b>	<b>-</b>	<b>17,641,532</b>
<b>Prof. Accrual Bef. Success Fees</b>	<b>24,745,472</b>	<b>18,257,638</b>	<b>17,543,073</b>	<b>10,842,493</b>	<b>10,606,683</b>	<b>9,755,500</b>	<b>7,880,500</b>	<b>6,245,000</b>	<b>4,715,000</b>	<b>110,591,360</b>
Success Fee Accrual	29,000,000	-	-	(1,650,000)	-	-	-	-	-	27,350,000
<b>Prof. Accrual Incl. Success Fees</b>	<b>\$53,745,472</b>	<b>\$18,257,638</b>	<b>\$17,543,073</b>	<b>\$9,192,493</b>	<b>\$10,606,683</b>	<b>\$9,755,500</b>	<b>\$7,880,500</b>	<b>\$6,245,000</b>	<b>\$4,715,000</b>	<b>\$137,941,360</b>

(a) May 2019 Total column is net of overaccrual releases



(1) Feb 2019 represents total accruals for February 2019  
(2) Professional Accrual Before Success Fees - see bridge to budget cash flow on page 3

# **Exhibit 97**

**In The Matter Of:**  
*In Re:*  
*Sears Holdings Corporation*

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*David M. Schulte*  
*June 29, 2019*

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<p style="text-align: right;">Page 1</p> <p>1 2 UNITED STATES BANKRUPTCY COURT 3 FOR THE DISTRICT OF NEW YORK 4 5 6 In Re: 7 SEARS HOLDINGS CORPORATION, et al., 8 Debtors. 9 _____/ 10 11 12 DEPOSITION OF DAVID M. SCHULTE 13 New York, New York 14 Saturday, June 29, 2019 15 16 17 18 19 20 21 22 23 Reported by: 24 ANNETTE ARLEQUIN, CCR, RPR, CRR, CLR 25 JOB NO. 2019-73081</p>	<p style="text-align: right;">Page 3</p> <p>1 2 A P P E A R A N C E S: 3 4 AKIN GUMP STRAUSS HAUER &amp; FELD, LLP 5 Counsel for Unsecured Creditors 6 One Bryant Park 7 Bank of America Tower 8 New York, New York 10036 9 BY: JOSEPH L. SORKIN, ESQ. 10 Jsorkin@akingump.com 11 12 WEIL GOTSHAL &amp; MANGES, LLP 13 Counsel for Debtors and 14 Debtors-in-Possession: Sears Holdings 15 Corporation, et al.,: 16 200 Crescent Court - Suite 300 17 Dallas, Texas 75201-6950 18 BY: PAUL GENENDER, ESQ. 19 Paul.genender@weil.com 20 BY: JAKE RUTHERFORD, ESQ. 21 Jake.rutherford@weil.com 22 23 24 25</p>
<p style="text-align: right;">Page 2</p> <p>1 2 3 4 5 June 29, 2019 6 8:00 a.m. 7 8 Deposition of DAVID M. SCHULTE, 9 held at the offices of WEIL GOTSHAL &amp; 10 MANGES, LLP, 767 Fifth Avenue, New 11 York, New York, pursuant to Notice, 12 before Annette Arlequin, a Certified 13 Court Reporter, a Registered 14 Professional Reporter, a Certified 15 Realtime Reporter, and a Realtime 16 Systems Administrator and a Notary 17 Public of the State of New York and 18 New Jersey. 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 2 A P P E A R A N C E S(Cont'd.): 3 4 CLEARY GOTTLIEB STEEN &amp; HAMILTON, LLP 5 Counsel for ESL Investments, Inc. 6 One Liberty Plaza 7 New York, New York 10006 8 BY: THOMAS J. MOLONEY, ESQ. 9 Tmoloney@cgsh.com 10 BY: KATHERINE LYNCH, ESQ. 11 Kalynch@cgsh.com 12 13 MILBANK 14 Counsel for Cyrus Capital 15 2029 Century Park East, 33rd Floor 16 Los Angeles, California 90067-3019 17 BY: ROBERT J. LIUBICIC, ESQ. 18 Rliubicic@milbank.com 19 BY: SAM PAYNE, ESQ. 20 Spayne@milbank.com 21 22 23 24 25</p>

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1  
2 A P P E A R A N C E S(Cont'd.):  
3  
4 SEYFARTH SHAW  
5 Counsel for Wilmington Trust, National  
6 Association, as Indenture Trustee and  
7 Collateral Agent  
8  
9  
10 ALSO PRESENT:  
11  
12 Michael J. Kennedy, Chilmark Partners  
13 Chris Kim, FTI Consulting  
14 Brian Griffith, M-III Partners  
15 Nicholas Weber, M-III Partners  
16 Jonathan Boffi, M-III Partners  
17  
18 - oOo -  
19  
20  
21  
22  
23  
24  
25

Page 6

1  
2 D A V I D S C H U L T E, called as a  
3 witness, having been duly sworn by a  
4 Notary Public, was examined and  
5 testified as follows:  
6 THE WITNESS: Yes, I do.  
7 David Schulte, S-c-h-u-l-t-e.  
8 EXAMINATION BY  
9 MR. GENENDER:  
10 Q. Could you please state your full  
11 name for the record?  
12 A. I just did, David Schulte.  
13 Q. What is your middle initial?  
14 A. M for Michael.  
15 Q. Where do you live?  
16 A. I live in Chicago, Illinois.  
17 Q. How are you employed?  
18 A. I'm the managing partner of  
19 Chilmark Partners.  
20 Q. And you understand your  
21 deposition has been noticed for this time  
22 in this matter?  
23 A. Yes.  
24 Q. Have you given depositions  
25 before?

Page 7

1  
2 A. Yes.  
3 Q. On how many occasions?  
4 A. I don't know. Several.  
5 Q. When was the last deposition you  
6 gave?  
7 A. I don't remember. Within the  
8 last couple of years. I don't remember.  
9 Q. Do you know which case it was in?  
10 A. I'm just trying to remember if it  
11 got to deposition, the ambulance thing.  
12 THE WITNESS: It never got to  
13 deposition, did it, Michael?  
14 A. I don't recall.  
15 Q. Your expert report said you  
16 provided expert testimony twice in the last  
17 five years.  
18 Do you recall that?  
19 A. In live court hearings or in  
20 deposition?  
21 Q. Well, it's your expert report.  
22 A. Thank you.  
23 I don't know which county. Sure.  
24 Some of these cases have settled and some  
25 have gone to deposition and some have gone

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1  
2 to trial, so I'm a little stuck for exactly  
3 which ones.  
4 Q. Have you ever testified on 507(B)  
5 issues before?  
6 A. No.  
7 Q. Have you ever testified on 506(C)  
8 issues before?  
9 A. No.  
10 Q. Have you published any articles  
11 or treatises on five oh --  
12 A. No.  
13 Q. What was my question?  
14 A. Have I published any articles or  
15 treatises on those same two sections of the  
16 code, no.  
17 Q. Let me take a step back because I  
18 want to do this as --  
19 MR. MOLONEY: Go slower. Let him  
20 ask the question and then answer.  
21 BY MR. GENENDER:  
22 Q. I want to -- let me take a step  
23 back.  
24 If you don't hear a question that  
25 I ask you, will you let me know?



Page 9

1  
2 A. Sure.  
3 Q. If you don't understand a  
4 question that I ask you, will you let me  
5 know?  
6 A. Yes.  
7 Q. Will you let me finish my  
8 question before you start your answer?  
9 A. Probably.  
10 Q. Okay. Otherwise, you might be  
11 testifying to something that -- you might  
12 be answering something that's not what I'm  
13 asking you.  
14 And we want to be accurate,  
15 right?  
16 A. That is the risk. I understand.  
17 Q. Fair enough.  
18 And I'm going to do my level best  
19 to be as efficient with your time as I  
20 possibly can.  
21 A. Thank you.  
22 Q. You bet.  
23 What did you do to prepare for  
24 this deposition?  
25 A. Over the course of weeks I

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1  
2 reviewed many documents in this case and I  
3 discussed everything that's in the report  
4 with colleagues in my office.  
5 Q. And which colleagues in your  
6 office?  
7 A. Michael Kennedy and Jamie Ellis,  
8 principally.  
9 Q. And they're here today?  
10 A. Michael Kennedy is here today.  
11 Q. Did you meet with counsel to  
12 prepare for this deposition?  
13 A. Yes.  
14 Q. When did you meet with counsel to  
15 prepare for this deposition?  
16 A. Yesterday.  
17 Q. For how long?  
18 A. Several hours, four hours maybe.  
19 Q. Who was present from -- as  
20 counsel?  
21 A. Well, mainly Tom Moloney and  
22 Katherine Lynch and then there were several  
23 other Cleary people at various times.  
24 Q. Did you review any documents in  
25 preparation for this deposition that

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1  
2 refreshed your memory of anything?  
3 A. Yes.  
4 Q. Which ones?  
5 A. Oh my, dozens.  
6 Q. Well, when were you engaged in  
7 this matter?  
8 A. I don't recall the actual date, a  
9 few months ago.  
10 Q. So this is -- today's June 29th?  
11 A. Yes.  
12 Q. A few months ago. Were you  
13 engaged in April?  
14 A. I don't recall the date. I told  
15 you that.  
16 Q. You said you didn't recall the  
17 exact date.  
18 Do you recall an approximate  
19 date?  
20 MR. MOLONEY: He said he didn't  
21 recall a date.  
22 BY MR. GENENDER:  
23 Q. Do you recall approximately when  
24 you were engaged?  
25 A. No. The best I can do is a few

Page 12

1  
2 months ago.  
3 Q. Okay. A few.  
4 When did you start work on this  
5 matter?  
6 A. More than one, less than five.  
7 Q. When did you start work on this  
8 matter?  
9 A. I don't have time sheets in front  
10 of me, but I would suppose it would be the  
11 same answer.  
12 Q. A few months ago?  
13 A. Yes. Although mainly in the last  
14 month or so.  
15 Q. When did you start preparing your  
16 report in this matter?  
17 A. Well, that report is a product of  
18 several drafts. I don't know the precise  
19 date of any of the drafts. It would be the  
20 same answer, which is a few months ago.  
21 (Schulte Exhibit 1, Expert Report  
22 of David M. Schulte, marked for  
23 identification, as of this date.)  
24 BY MR. GENENDER:  
25 Q. I'm handing you what's been

Page 13

1  
2 marked as Exhibit 1.  
3 Can you identify Exhibit 1 for  
4 me, please?  
5 A. Yes, this is my report.  
6 MR. MOLONEY: Without all the  
7 exhibits or does it have all the  
8 exhibits?  
9 (Document review.)  
10 MR. MOLONEY: Okay, it does.  
11 BY MR. GENENDER:  
12 Q. Let me try to ask this one more  
13 time.  
14 Is Exhibit 1 a true and correct  
15 copy of your report?  
16 MR. FOX: Paul, can you speak up.  
17 A. Yes, this is a copy of the  
18 report.  
19 Q. I'm asking questions today.  
20 Is Exhibit 1 a true and correct  
21 copy of your report in this matter?  
22 A. I believe so.  
23 Q. And what is the date on it?  
24 (Document review.)  
25 A. There must be a date somewhere.

Page 14

1  
2 Q. Do you recall when you finalized  
3 it?  
4 A. As I said to you, it's been  
5 through several drafts and I cannot give  
6 you a precise date. It must appear here  
7 somewhere.  
8 (Document review.)  
9 THE WITNESS: Can you find a  
10 date?  
11 MR. MOLONEY: Probably --  
12 MR. GENENDER: Hang on, I really  
13 just want --  
14 MR. MOLONEY: He wants your  
15 answer.  
16 MR. GENENDER: Exactly.  
17 A. I don't see an exact date. It  
18 must be here somewhere, but I don't see  
19 where.  
20 Q. Did you sign Exhibit 1?  
21 A. Yes.  
22 Q. Your counsel is pointing you to  
23 page 24.  
24 MR. MOLONEY: Page 24. Your  
25 signature.

Page 15

1  
2 BY MR. GENENDER:  
3 Q. And that is your signature, your  
4 electronic signature?  
5 A. That's a signature. I don't see  
6 a date. Yes.  
7 Q. My question is: Is that your  
8 electronic signature?  
9 A. I think there is an original  
10 somewhere that I actually saw in my hand.  
11 Q. This is what I was provided, this  
12 version, Exhibit 1. I'll represent that to  
13 you.  
14 A. I think that is the only version.  
15 I mean apart from where he drafts.  
16 Q. Who drafted Exhibit 1?  
17 A. I did, and the same two  
18 colleagues who I named before.  
19 Q. How many drafts were there?  
20 A. Oh, God, I don't remember.  
21 Several.  
22 Q. Which portions did you draft?  
23 A. All of it.  
24 Q. You drafted all of it; is that  
25 right?

Page 16

1  
2 A. I laid hands on all of it. I  
3 didn't do the first draft on any of it.  
4 Q. Who did the first draft?  
5 A. The two people I mentioned to you  
6 before.  
7 The way we work --  
8 Q. I'm not --  
9 MR. MOLONEY: He's not asking  
10 that.  
11 MR. GENENDER: There is no  
12 question on the floor.  
13 THE WITNESS: He probably doesn't  
14 really want to know.  
15 MR. MOLONEY: No, he doesn't want  
16 to know.  
17 MR. GENENDER: Object to the  
18 sidebar.  
19 BY MR. GENENDER:  
20 Q. I just want you to ask -- answer  
21 my questions, and this will go as smoothly  
22 as possible.  
23 Did you review any case law in  
24 preparing Exhibit 1 to your report?  
25 A. Only the case law that's

Page 17

1  
2 mentioned in the text.  
3 Q. Which case is that?  
4 A. I don't recall.  
5 Q. Can you find it?  
6 A. There are mentions of cases on  
7 this section of the code. There's case  
8 law...  
9 (Document review.)  
10 MR. GENENDER: Hang on, hang on.  
11 Tom, I'm going to object to you showing  
12 him. I'm asking him.  
13 MR. MOLONEY: You want him to  
14 read the whole report? I thought you  
15 said you wanted to be efficient.  
16 MR. GENENDER: I am going to ask  
17 you not to prompt him with any answers.  
18 THE WITNESS: He's not prompting  
19 me.  
20 MR. MOLONEY: Just take your time  
21 and read the whole report then.  
22 BY MR. GENENDER:  
23 Q. If you can --  
24 MR. MOLONEY: I wanted to  
25 expedite it, but if you want --

Page 18

1  
2 BY MR. GENENDER:  
3 Q. Can you identify case law that  
4 you referred to in your report? That's my  
5 question.  
6 (Document review.)  
7 A. I'm looking for a precise  
8 reference and not finding it. You want to  
9 stay all day, we can keep looking.  
10 MR. MOLONEY: Look at page 23.  
11 MR. GENENDER: Okay. Well,  
12 Counsel, that is exactly what I asked  
13 you not to do, which is to prompt his  
14 answer, and I'm objecting to it and  
15 moving to strike it.  
16 MR. MOLONEY: Okay. Good.  
17 BY MR. GENENDER:  
18 Q. Mr. Schulte, as you sit here  
19 today, can you without -- do you have any  
20 memory of any case you cited in your  
21 report?  
22 A. Yes, I quote the Sabine Oil case.  
23 Q. Did you review that entire  
24 opinion --  
25 A. No.

Page 19

1  
2 Q. -- in your report?  
3 A. No.  
4 Q. You did not?  
5 A. I did not.  
6 Q. Okay. Are you offering any legal  
7 opinions in this case?  
8 A. I am not.  
9 Q. Have you ever offered any legal  
10 opinions in your career as an expert?  
11 A. I am a member of the District of  
12 Columbia bar, but I don't practice law. So  
13 any -- any legal opinions would be not --  
14 not part of my normal work.  
15 Q. You're a licensed attorney?  
16 A. I'm a member of the District of  
17 Columbia bar.  
18 Q. Are you a licensed -- do you have  
19 a law license?  
20 A. That is a law license.  
21 Q. When was the last time you  
22 practiced law?  
23 A. Never.  
24 Q. You never practiced law?  
25 A. Correct.

Page 20

1  
2 Q. Okay. Did you practice law when  
3 you clerked for the United States Supreme  
4 Court?  
5 A. I wouldn't call that practicing  
6 law, but yes.  
7 Q. What would you call it?  
8 A. Assisting a judge. Research  
9 assistant. Whipping boy.  
10 Q. Did you speak to anyone at ESL in  
11 connection with any of your work on this  
12 case?  
13 A. I have not spoken to anyone,  
14 except one conversation with Eddie Lampert  
15 when we talked about everything but this  
16 case.  
17 Q. When did that conversation occur?  
18 A. Within the last two weeks.  
19 Q. Did you call him?  
20 A. He telephoned me.  
21 Q. About what?  
22 A. It wasn't clear. It was just a:  
23 Hello, how are you. I'd never talked to  
24 the man.  
25 Q. Had you ever met him before?

Page 21

1  
2 A. Never.  
3 Q. He called you? Was he by himself  
4 when he called you?  
5 A. I don't know.  
6 Q. Did he say anyone else was on the  
7 phone?  
8 A. We didn't -- no. He was on his  
9 boat off the coast of Scotland. I doubt he  
10 was making his wife listen, so I assume he  
11 was alone, but I don't know.  
12 Q. What did you talk about?  
13 A. We talked about his boat and we  
14 talked about the coast of Scotland. We did  
15 not talk about this case.  
16 I have been retained through  
17 Cleary Gottlieb on behalf of ESL and I  
18 think he simply wanted to administer a kind  
19 of a saliva test. I think he just wanted  
20 to say hello. I mean...  
21 Q. Did he ask you about any of your  
22 work on this matter?  
23 A. No.  
24 Q. Had you already prepared your  
25 report at this time?

Page 22

1  
2 A. In draft, yes.  
3 Q. Do you know if he had seen it?  
4 A. I do not know.  
5 Q. Did he ask you about any of your  
6 opinions?  
7 A. No.  
8 Q. Did he discuss any aspect of this  
9 case with you?  
10 A. Not really, except the overall,  
11 you know, 10 or 12 years of whatever and  
12 what an ordeal it had been, but no, not  
13 really.  
14 Q. You said he discussed what an  
15 ordeal it had been.  
16 Can you expand upon that?  
17 A. I offered sympathy. I offered  
18 sympathy.  
19 Q. What sympathy did you offer to  
20 Mr. Lampert?  
21 A. It was a Rolling Stone song,  
22 Sympathy For the Devil.  
23 We had earlier in my business  
24 life owned a department store chain in  
25 California, and much like his involvement

Page 23

1  
2 with Sears, we had tried to fix it, and in  
3 the end we were unsuccessful in doing that.  
4 And I offered sympathy based upon my own  
5 personal experience.  
6 Q. What was his response to that?  
7 A. He listened.  
8 Q. How long did the conversation  
9 take?  
10 A. I didn't clock it. I'm guessing  
11 it took 20 minutes.  
12 Q. Your best estimate is 20 minutes?  
13 A. 20 minutes, 30 minutes.  
14 Q. Did he call you in your office?  
15 A. No, I was at home.  
16 Q. He called you at home?  
17 A. Yes. On my cellphone.  
18 Q. He called you on your cellphone?  
19 A. Yes.  
20 Q. Did anyone tell you he was going  
21 to call you on your cellphone?  
22 A. Yes, it was sort of -- well, not  
23 a precise time, but counsel told me that he  
24 wanted to say hello, I gave my cellphone  
25 number, and I expected a call. It was not

Page 24

1  
2 expected at any particular time.  
3 Q. Did you ask any questions of him  
4 about his case?  
5 A. No.  
6 Q. Did you vet any of your draft  
7 opinions with him during that 20 or 30  
8 minute conversation?  
9 A. No.  
10 Q. Have you spoken with anyone else  
11 at ESL?  
12 A. I have never spoken with anyone  
13 else at ESL.  
14 Q. Have you spoken with anyone who  
15 works at Transform?  
16 A. No.  
17 Q. Do you know what Transform is?  
18 A. Yes.  
19 Q. Have you spoken with any advisers  
20 for ESL or Transform as opposed to lawyers;  
21 financial advisers?  
22 A. No.  
23 Q. When I'm saying you, you or your  
24 team, same answers?  
25 MR. MOLONEY: That is a different

Page 25

1  
2 question. What is your question? What  
3 is your question now? Go ahead.  
4 BY MR. GENENDER:  
5 Q. Has anyone on your team spoken  
6 with anyone -- to your knowledge, spoken  
7 with anyone at ESL?  
8 A. Not to my knowledge.  
9 Q. Has anyone on your team spoken  
10 with anyone at Transform, to your  
11 knowledge?  
12 A. Not to my knowledge.  
13 Q. Has anyone on your team spoken  
14 with any of ESL or Transform's financial  
15 advisers?  
16 A. Not to my knowledge.  
17 Q. I'm distinguishing, when I'm  
18 saying advisers, I mean people other than  
19 the lawyers.  
20 A. I understand.  
21 Q. Fair enough.  
22 Same answer?  
23 A. Not to my knowledge.  
24 Q. Have you spoken with any of  
25 the -- strike that.

Page 26

1  
2 Who is your client in this  
3 matter?  
4 A. My client is Cleary Gottlieb.  
5 Q. Okay. Who do you understand  
6 their client to be?  
7 A. Their client is ESL.  
8 Q. Is your report, Exhibit 1,  
9 submitted on behalf of ESL?  
10 A. I don't think so. They did not  
11 approve it, pass upon it, or have anything  
12 to do with its -- apart from document  
13 production, along the way we've probably  
14 got the documents from them, but to my  
15 knowledge, if they've seen a draft, it's  
16 news to me.  
17 Q. If ESL has seen a draft of your  
18 report, it's --  
19 A. If ESL --  
20 Q. Hang on, Mr. Schulte, I'm going  
21 to ask you to let me finish my question. I  
22 know. It's for the record, so we're clear  
23 on the record, okay? I'm not trying to be  
24 difficult, but I'm just going to ask you to  
25 let me finish my question, okay?

Page 27

1  
2 A. Yes, sir.  
3 Q. I appreciate it.  
4 To your knowledge, has anyone at  
5 ESL seen your report?  
6 A. I am not aware of any such.  
7 Q. Did you show any of your -- did  
8 you show any version of your report to  
9 anyone at ESL prior to it being finalized  
10 in the form that it's in in Exhibit 1?  
11 A. I did not.  
12 Q. Did you ask for anyone -- did you  
13 ask for anyone at ESL to review and approve  
14 any of your opinions prior to them being  
15 finalized?  
16 A. I did not.  
17 Q. Did you ask ESL for any  
18 information in connection with your  
19 opinions in this case?  
20 A. I did not personally ask for  
21 anything like that.  
22 Q. Did anyone on your team ask ESL  
23 for any information in connection with  
24 preparing your opinions in this case?  
25 A. Not that I'm specifically aware

Page 28

1  
2 of.  
3 Q. Who is in charge of your team?  
4 A. Michael Kennedy.  
5 Q. He's in charge of your team or  
6 you --  
7 A. No. I'm in charge of the team.  
8 Excuse me. I'm in charge of the team, but  
9 I did not direct anyone to ask anything of  
10 ESL or to preview anything with ESL or gain  
11 approval or comment or any such thing.  
12 Q. And to your knowledge, none of  
13 those approvals or comments were obtained?  
14 A. Not to my knowledge.  
15 Q. How long have you worked with  
16 Mr. Kennedy?  
17 A. Fifteen years, perhaps.  
18 Q. Would it surprise you if he -- if  
19 he sought those approvals or comments  
20 without you knowing?  
21 MR. MOLONEY: Objection to the  
22 form of the question. You may answer.  
23 A. I'm not sure. Would you --  
24 between the two of you, would you tell me  
25 what the question is?

Page 29

1  
2 Q. Would it surprise you if  
3 Mr. Kennedy sought comment or approval from  
4 ESL without you knowing?  
5 MR. MOLONEY: Objection to the  
6 form of the question. You may answer.  
7 A. The answer to that one is yes, it  
8 would surprise me.  
9 Q. Thank you.  
10 Have you spoken with any of the  
11 other second lienholders?  
12 A. No.  
13 Q. Do you know who the other second  
14 lienholders are?  
15 A. I know the name Cyrus and I don't  
16 know anyone else.  
17 Q. Have you reviewed any reports  
18 submitted by the other second lienholders?  
19 A. I have reviewed expert reports  
20 done on behalf of Wilmington Trust and done  
21 on behalf of Cyrus. I think those two.  
22 And of course, Mr. Griffith, done on your  
23 behalf.  
24 Q. Did you review the report  
25 submitted on behalf of Cyrus and Wilmington

Page 30

1  
2 Trust prior to them being finalized?  
3 A. No.  
4 Q. Did you coordinate with the  
5 experts for Wilmington Trust or Cyrus prior  
6 to finalizing your report?  
7 A. No.  
8 Q. Did you speak with them prior to  
9 finalizing your report?  
10 A. No, not before and not since.  
11 Q. Thank you.  
12 Have any of the opinions  
13 contained in your report, which is  
14 Exhibit 1, changed since you finalized it?  
15 A. No.  
16 Q. Do you have any expectation of  
17 changing any of your opinions?  
18 A. I have no expectation, but if  
19 facts change or if I became aware of  
20 something that would occasion a change, I  
21 reserve the right to change, but I'm not  
22 expecting that.  
23 Q. In preparation for this  
24 deposition, have you gone through the  
25 materials cited in your report upon which

Page 31

1  
2 your opinions are based?  
3 A. Yes.  
4 Q. Is it your testimony that those  
5 documents provide an appropriate basis for  
6 the opinions you're offering in this case?  
7 A. Well, they're raw materials,  
8 they're relevant. I don't recall anything  
9 than I relied upon analytically in those  
10 reports.  
11 Q. Have you reviewed the filings by  
12 my client from two days ago?  
13 A. Apart from Mr. Griffith, I do not  
14 think so.  
15 Q. Did you review Mr. Griffith's  
16 supplemental declaration filed two days  
17 ago?  
18 A. Yes.  
19 Q. When did you review that?  
20 A. Yesterday.  
21 Q. Does that cause you to change any  
22 of your opinions?  
23 A. No.  
24 Q. Did it cause you to do any  
25 additional work in connection with this

Page 32

1  
2 case?  
3 A. Apart from preparation for this  
4 deposition, no.  
5 Q. Your report contains background  
6 information about you; is that correct?  
7 A. That is correct.  
8 Q. Do you stand by all of it?  
9 A. Yes, sir.  
10 Q. To your knowledge, is it complete  
11 and accurate?  
12 A. Well, complete... it is  
13 accurate.  
14 Q. Okay. Who contacted you in  
15 connection with working on this case? Who  
16 initially contacted you?  
17 A. I believe it was a Cleary partner  
18 called Sean O'Neal.  
19 Q. And do you know Mr. O'Neal?  
20 A. Yes.  
21 Q. And how do you know Mr. O'Neal?  
22 A. I met him in the course of doing  
23 business. I can't pinpoint how I knew him  
24 first.  
25 Q. Had he engaged you previously,



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1  
2 you or your firm?  
3 A. Mr. O'Neal specifically?  
4 Q. Sure.  
5 A. I have done other work with  
6 Cleary Gottlieb. Whether he was the one or  
7 not, I'm just not sure.  
8 Q. What other matters have you been  
9 engaged on for Cleary Gottlieb?  
10 A. Well, most recently in connection  
11 with the litigation over a leverage buyout  
12 called Rural Metro.  
13 Q. What about other matters that you  
14 can recall?  
15 A. Well, over 40 years there are  
16 quite a few.  
17 Q. Over how many years have you been  
18 providing expert opinions?  
19 A. I don't do very much of this. So  
20 I have done expert opinions here and there  
21 over most of my professional life, but it's  
22 not a product line that I specialize in.  
23 Q. Have you assisted in preparing  
24 any of ESL's filings in this case?  
25 A. No.

Page 34

1  
2 Q. Have you -- I'm going to talk  
3 about a couple things in specific.  
4 There is an adversary pleading  
5 that was filed in the last month by ESL.  
6 Did you play any role in  
7 preparing it?  
8 A. I did not.  
9 Q. There is briefing that was filed  
10 contemporaneously with your report, which  
11 is Exhibit 1, filed by ESL either on its  
12 own or jointly.  
13 Did you play any role in  
14 preparing any of that briefing?  
15 A. I did not.  
16 Q. Did you review any of it prior to  
17 it being filed?  
18 A. I did not.  
19 Q. Would it be fair to say that the  
20 universe of your work in this case is  
21 contained in Exhibit 1, your report?  
22 A. Yes.  
23 Q. Thank you.  
24 Your report on page 5 references  
25 previous restructuring experience.

Page 35

1  
2 Do you see that?  
3 A. Yes.  
4 Q. All right. Were any of these  
5 liquidations? If you know.  
6 A. I have to look.  
7 Q. I should say, if you remember.  
8 I'm assuming at the time you would have  
9 known, but if you recall as you sit here.  
10 A. Brooks Fashion Stores may have  
11 been liquidation.  
12 Q. Okay.  
13 A. That was a long time ago.  
14 (Document review.)  
15 A. The most recent would be  
16 Toys-R-Us, which was a mixed picture.  
17 There was some going-concern transactions  
18 and then there were -- and there was  
19 liquidation, both.  
20 Q. Okay. Were those the ones  
21 that -- and there are some -- there are a  
22 couple at the top of page 6, in fairness.  
23 I guess, four at the top of page 6.  
24 Are those -- possibly Brooks and  
25 Toys, are those the ones that jump out as

Page 36

1  
2 potentially or actually liquidation  
3 matters?  
4 A. With Brooks, I'm guessing.  
5 Q. Okay.  
6 A. It was a long time ago.  
7 With Toys-R-Us, certainly.  
8 Q. What was your role -- any others  
9 that you recall being liquidations?  
10 A. Tower Records.  
11 Q. What was your role in the  
12 Toys-R-Us case?  
13 A. In the Toys-R-Us case I was the  
14 sole independent director and chief  
15 conflicts officer of a subsidiary of  
16 Toys-R-Us called Geoffrey, spelled  
17 G-E-O-F-F-R-E-Y, which was the intellectual  
18 property subsidiary of Toys-R-Us.  
19 Q. What work did you do in that  
20 capacity in the Toys-R-Us bankruptcy?  
21 A. The mission was to protect,  
22 implicitly, the creditors of Geoffrey from  
23 the theft of intellectual property by  
24 various people who had designs on it.  
25 Q. Did you perform any analysis of

Page 37

1  
2 the valuation of any collateral in the  
3 Toys-R-Us bankruptcy?  
4 A. I don't think so.  
5 Q. Did you --  
6 A. Geoffrey -- Geoffrey had nothing  
7 in it. Geoffrey's assets were solely the  
8 trademarks.  
9 Q. All right. I asked you this in a  
10 different sense, but looking at the  
11 matters, your previous restructuring  
12 experience listed on page 5 and 6 of your  
13 report, did your work in connection with  
14 any of those matters involve analysis of  
15 507(B) claims?  
16 A. No.  
17 Q. What about 506(C) surcharges?  
18 A. No.  
19 Q. Page 4 of your report lists your  
20 opinions, correct? The top half of the  
21 page or middle of the page, I should say.  
22 (Document review.)  
23 A. You're referring to the part  
24 where I say "In summary, my conclusions  
25 are..."

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1  
2 Q. Yes.  
3 A. Yes.  
4 Q. Have you prepared -- strike that.  
5 Have you or your team prepared  
6 any exhibits or demonstratives that would  
7 support any of your opinions beyond that  
8 which is contained in your report?  
9 A. I believe everything that  
10 supports these conclusions is in the  
11 report.  
12 Q. Have you all prepared anything  
13 else to show any of your conclusions other  
14 than what's in the report?  
15 A. Not to my knowledge.  
16 Q. Okay. Do you recall when a first  
17 draft of this report was prepared?  
18 A. I do not.  
19 Q. Was it done during the month of  
20 May of 2019?  
21 A. Same answer, I do not know.  
22 Q. Could it have been done during  
23 the month of May 2019?  
24 A. Remind me, could which have been  
25 done?

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1  
2 Q. Could the first draft of this  
3 report been prepared during the month of  
4 May 2019?  
5 A. I don't remember. That seems a  
6 little recent, but it's possible.  
7 Q. A little recent, like you think  
8 it would have been done earlier than that?  
9 A. Earlier.  
10 Q. Okay.  
11 A. I think as a first draft. I  
12 think. I'm not positive, but I think.  
13 Q. So it's possible then that the  
14 first draft could have been done in April  
15 of 2019?  
16 A. It's possible.  
17 Q. Could it have been done in March  
18 of 2019?  
19 A. As I -- earlier you asked me when  
20 I commenced work on this and I told you I  
21 wasn't sure. So it's really the same  
22 point. I don't know.  
23 Q. Do you have an engagement letter  
24 with Cleary Gottlieb for this matter?  
25 A. Yes, it's somewhere.

Page 40

1  
2 Q. Okay. Does it have a date on it?  
3 A. Probably.  
4 Q. And are you charging hourly?  
5 A. Yes.  
6 Q. And your report reflects the  
7 rates, correct?  
8 A. Yes.  
9 Q. So your time entries, you would  
10 have time entries that would show when your  
11 work started, yes?  
12 A. Yes.  
13 MR. MOLONEY: We can tell you  
14 that. We'll tell you.  
15 MR. GENENDER: Perfect. I was  
16 going to either leave a space in the  
17 deposition, or Tom, you could --  
18 MR. MOLONEY: We will tell you.  
19 MR. GENENDER: You could tell me  
20 that. That would be great.  
21 MR. MOLONEY: Thank you.  
22 BY MR. GENENDER:  
23 Q. Lawyers get awfully efficient on  
24 Saturday mornings.  
25 A. And they hold time charges dear

Page 41

1  
2 to their hearts.  
3 Q. Who was the first person at  
4 Cleary Gottlieb who talked to you about  
5 what they were looking for in terms of your  
6 work in this case?  
7 A. Probably Sean O'Neal.  
8 Q. And what did he tell you?  
9 A. I don't remember.  
10 Q. What about approximately, do you  
11 have any vague idea?  
12 A. Well, when it came about, when  
13 the inquiry was made about whether we would  
14 take this on, the question was about a  
15 diminution in the value of collateral.  
16 Q. Had you ever done a report --  
17 strike that.  
18 Have you ever offered an opinion  
19 before on the diminution of the value of  
20 collateral prior to this engagement?  
21 A. No.  
22 Q. And you've never offered an  
23 opinion on the applicability of a 506(C)  
24 surcharge before, correct?  
25 A. That is correct.

Page 42

1  
2 Q. So when Mr. O'Neal had this  
3 conversation with you, which presumably led  
4 to you being engaged; is that fair?  
5 A. Is which fair?  
6 Q. That his conversation with you  
7 about an offering -- whether you'd be  
8 interested in offering an opinion on  
9 diminution in value of collateral, somehow  
10 that led to you accepting the engagement,  
11 correct?  
12 A. Yes.  
13 Q. What questions did you ask when  
14 you had this conversation with him?  
15 A. I don't recall.  
16 Q. Who was with you when you had the  
17 conversation with him? The first  
18 conversation.  
19 A. I don't recall.  
20 Q. Did you work with Mr. O'Neal  
21 throughout preparing Exhibit 1, your  
22 report?  
23 A. Well, I personally?  
24 Q. Yes, sir.  
25 A. Until recently, yes.

Page 43

1  
2 Q. Okay. Did Mr. O'Neal provide  
3 comments to you on drafts of your report?  
4 A. Not to me.  
5 Q. Did he provide them to your team?  
6 A. I don't know.  
7 Q. Who would know?  
8 A. The members of my team would  
9 know. Mr. O'Neal would know.  
10 Q. Were drafts of your reports  
11 shared with the lawyers at Cleary Gottlieb?  
12 A. Yes.  
13 Q. Were portions of your report  
14 drafted by Cleary Gottlieb?  
15 A. No.  
16 Q. Do you know that for certain?  
17 A. It's not what we do.  
18 Q. I'm just asking you a question.  
19 I'm not asking what you do.  
20 A. You asked me for certain.  
21 There's so many things in the world that I  
22 don't know. It is not customary and it was  
23 not customary in this matter for any  
24 sections of the report to be written by  
25 anyone other than us.

Page 44

1  
2 Q. Do you know how much time you've  
3 spent on this engagement, you personally?  
4 A. I don't have that in my head. I  
5 would say --  
6 Q. Best estimate.  
7 A. Somewhere between 20 and 50 hours  
8 probably.  
9 Q. That's for you personally?  
10 A. Yes.  
11 Q. What about your team?  
12 A. I don't know.  
13 Q. Would it be more or less than  
14 that?  
15 A. I don't know. Probably more, but  
16 I don't know.  
17 Q. And we talked about this, I  
18 believe, but no one at ESL provided you any  
19 information that you used in the report,  
20 correct?  
21 A. Me personally, correct.  
22 Q. Or to your team personally, to  
23 your knowledge?  
24 A. I don't know. There are lots of  
25 documents in this case, as you know, and I

Page 45

1  
2 don't know where some of these came from,  
3 whether they came from counsel or if they  
4 came from ESL or Transform. I don't know  
5 the answer to that.  
6 And in fact, we relied on the  
7 general ledger quite a bit that probably  
8 originated with either ESL or Transform,  
9 but I had no particular connection to that.  
10 Q. Mr. Schulte, you raise a fair  
11 point, and I want to refine my question,  
12 and you made a fair distinction.  
13 A. Thank you.  
14 Q. You're welcome.  
15 Certainly some of the underlying  
16 information came from ESL.  
17 My question is: In terms of  
18 someone from ESL, whether by email or  
19 telephone or otherwise, providing you  
20 information or guidance in connection with  
21 your opinions, that didn't occur; is that  
22 correct?  
23 A. That did not occur.  
24 Q. Thank you.  
25 Were you asked to assume certain

Page 46

1  
2 things in connection with your opinions in  
3 this case?  
4 A. That's a very broad question.  
5 Can you help me out a little?  
6 Q. Were you provided any assumptions  
7 about the 2L collateral?  
8 A. No.  
9 Q. Have you reviewed the underlying  
10 credit documents related to the second  
11 lienholders?  
12 A. I probably glanced at them.  
13 Q. Have you studied them?  
14 A. No.  
15 Q. Would you agree they say what  
16 they say?  
17 MR. MOLONEY: Objection to the  
18 form of the question.  
19 A. I believe most documents say what  
20 they say.  
21 Q. But you didn't study them?  
22 A. Right.  
23 Q. Did you study any intercreditor  
24 documents?  
25 A. No.

Page 47

1  
2 Q. What did you do to verify that  
3 every item that your report lists as second  
4 lien collateral was actually second lien  
5 collateral?  
6 A. I, in making judgments like that,  
7 took the word of my colleagues who have  
8 reviewed all this with counsel.  
9 Q. So you personally took the word  
10 of your colleagues who spoke with the  
11 lawyers at Cleary Gottlieb; is that  
12 correct?  
13 A. Correct.  
14 Q. What did you do to independently  
15 verify any of that information?  
16 A. Your question is, what did I do  
17 to independently verify the work of my  
18 colleagues?  
19 Q. Sir, in connection with -- in  
20 connection with determining whether the  
21 items your report considered second lien  
22 collateral were actually second lien  
23 collateral?  
24 A. I took their word for it.  
25 Q. Thank you.

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1  
2 If they made a mistake in  
3 categorizing something as second lien  
4 collateral when, in fact, it is not, that  
5 would affect your opinion, wouldn't it?  
6 A. Depending upon what the something  
7 is.  
8 Q. Okay. Do you have any personal  
9 knowledge as to whether pharmacy  
10 receivables, pharmacy prescriptions, are  
11 second lien collateral?  
12 MR. MOLONEY: Objection to the  
13 form of the question. Calls for a  
14 legal conclusion.  
15 But you may answer.  
16 A. I did not do anything like that.  
17 Q. Fair enough, and I appreciate  
18 your answer.  
19 Would that also -- would it also  
20 be true, therefore, that you don't have an  
21 understanding, based on personal knowledge,  
22 as to whether pharmacy receivables are  
23 appropriate second lien collateral in this  
24 case?  
25 MR. MOLONEY: Objection to the

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1  
2 form of the question.  
3 A. I have no independent knowledge  
4 about that.  
5 Q. And if I asked you the same  
6 question about pharmacy scripts, would your  
7 answer be the same?  
8 A. It was not my task. I'll make  
9 this a little easier in the interest of  
10 efficiency.  
11 It was not my task to go through  
12 and either enumerate or include or exclude  
13 items that the -- the counsel and my  
14 colleagues review of documents indicated  
15 were included in the collateral package.  
16 Q. Thank you.  
17 Would it also be true you didn't  
18 do anything to determine whether cash  
19 should be included as appropriate second  
20 lien collateral?  
21 MR. MOLONEY: Same objection.  
22 You may answer.  
23 A. Correct.  
24 Q. Do you know whether your opinions  
25 as set forth in Exhibit 1 include cash as

Page 50

1  
2 second lien debt collateral?  
3 A. The opinion touches on -- I know  
4 we list cash as an item of second lien  
5 collateral and evaluated collateral. I  
6 know there's been discussion on the point  
7 and I know what the rationale is for  
8 including it. Whether we specifically in  
9 the report say that cash was second lien  
10 collateral or whether we say it was first  
11 lien collateral and we had a second lien on  
12 the collateral package, I'm not quite sure.  
13 Q. Can you turn to page 8 out of  
14 Exhibit 1, please?  
15 (Witness complies.)  
16 Q. Section B on that page is  
17 entitled: The value of non-inventory  
18 collateral, correct?  
19 A. Yes.  
20 Q. And the first bullet point under  
21 it is: Cash, and it says \$115.5 million,  
22 correct?  
23 A. Yes.  
24 Q. Do you know where that figure  
25 came from?

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1  
2 A. It was computed by my colleagues.  
3 Q. Okay. Do you know where that  
4 figure came from?  
5 MR. MOLONEY: He can read the  
6 report too. It's not a memory test.  
7 (Document review.)  
8 A. The origin of all of these  
9 numbers was the general ledger of Sears.  
10 Q. Did you personally review the  
11 general ledger of Sears?  
12 A. No.  
13 Q. Is it fair to say you've never  
14 laid eyes on the general ledger of Sears?  
15 A. It is not fair to say that.  
16 Q. So have you laid eyes on it?  
17 A. Yes. Parts of it.  
18 Q. Which parts of it?  
19 A. The parts that we recite. My  
20 colleagues have showed me what they were  
21 pointing to.  
22 Q. I'm going to hand you what I've  
23 marked Exhibit 2 to your deposition.  
24 (Schulte Exhibit 2, Excel of  
25 General Ledger, marked for

Page 52

1  
2 identification, as of this date.)  
3 BY MR. GENENDER:  
4 Q. Can you identify what Exhibit 2  
5 is?  
6 A. These were portions of the  
7 general ledger.  
8 Q. If you look at the first page of  
9 Exhibit 2 and you go about two-thirds,  
10 maybe three-fourths of the way down, do you  
11 see where there is an entry: Credit card  
12 deposits in transit, \$64,279,939?  
13 A. Yes.  
14 Q. And then below that it says:  
15 Cash and cash equivalents?  
16 A. Yes.  
17 Q. \$179,738,712?  
18 A. For the 2018 period.  
19 Q. Yes.  
20 Does the delta between those  
21 numbers, which is in the range of  
22 \$115,500,000, comprise the cash number  
23 reflected on page 8 of your report?  
24 A. Probably.  
25 Q. Do you know that for certain?



Page 53

1  
2 A. No.  
3 Q. Thank you.  
4 Are you able to articulate for  
5 this court the basis -- your basis for  
6 including the \$115.5 million of cash as  
7 second lien debt collateral?  
8 A. Well, we know there is a certain  
9 of amount of cash that was restricted for  
10 the benefit of the Pension Benefit Guaranty  
11 Corporation.  
12 The inclusion is because in our  
13 methodology we are subtracting from asset  
14 values certain items by way of discerning  
15 what the balance of the collateral accounts  
16 was on the date of the petition, and in  
17 doing that something that is an asset of  
18 the first lien counts, because we take the  
19 first lien and we subtract off the first  
20 lien balance, and what's left falls to the  
21 second lien.  
22 If we excluded it, we'd be  
23 undercounting the overall secured lender  
24 collateral.  
25 Q. Are you saying that if something

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1  
2 is collateral for the 1Ls, it's  
3 automatically collateral for the 2Ls?  
4 A. I'm saying that what is left for  
5 the 2Ls is the amount that belongs to the  
6 1Ls, less what they're owed.  
7 Q. What's your basis for saying  
8 that?  
9 A. My understanding of the Uniform  
10 Commercial Code.  
11 Q. And where do you cite the UCC in  
12 your report?  
13 A. I don't. I take notice of it.  
14 Q. But do you reference it in your  
15 report?  
16 A. No.  
17 Q. Okay. Which provision of the UCC  
18 would you be citing?  
19 A. Sir, this is common sense.  
20 Q. I'm just asking what provision of  
21 the UCC --  
22 A. I'm not citing -- I'm not citing  
23 provisions of the UCC.  
24 Q. Okay. And your report doesn't  
25 reference the UCC, does it?

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1  
2 A. No.  
3 Q. And we are in a bankruptcy  
4 proceeding, so you are referring to the  
5 Uniform Commercial Code as opposed to the  
6 Unsecured Creditors' Committee, correct?  
7 A. Yes.  
8 Q. That was deposition humor.  
9 A. Sorry?  
10 MR. MOLONEY: There is no  
11 question pending.  
12 BY MR. GENENDER:  
13 Q. I said that was a little  
14 deposition humor.  
15 A. Ah.  
16 Q. You see in the second bullet  
17 point on page 8 it refers to credit card  
18 receivables of \$64.2 million, correct?  
19 A. Yes, sir.  
20 Q. Credit card deposits in transit,  
21 right?  
22 A. Yes, sir.  
23 Q. And those, as we just said, are  
24 reflected on Tab 5 -- I'm sorry, on  
25 Exhibit 2 to your deposition, correct?

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1  
2 A. Yes.  
3 Q. All right.  
4 Have you reviewed any of the  
5 borrowing base certificates in connection  
6 with Sears?  
7 A. I know about them through  
8 colleagues. I have not independently  
9 reviewed them.  
10 Q. And you know what a borrowing  
11 base certificate is, don't you?  
12 A. I do.  
13 Q. And how would you explain it?  
14 A. A borrowing base certificate is a  
15 representation by a borrower, to lenders,  
16 of the value of whatever the borrowing  
17 agreement declares to be elements of the  
18 borrowing base.  
19 Q. Did you rely upon any of the  
20 borrowing base certificates for Sears in  
21 connection with any of your opinions in  
22 your report?  
23 A. Rely on them? We reviewed them,  
24 in part, and some of the experts pay closer  
25 attention to them than I did.



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1  
2 Q. Which experts are you referring  
3 to? For the other lienholders?  
4 A. Yes.  
5 Q. Okay. Not your team?  
6 A. Correct.  
7 Q. Thank you.  
8 Do you think a borrowing base  
9 certificate is a fair indicia of the value  
10 of collateral?  
11 A. No.  
12 Q. Why not?  
13 A. Because a borrowing base is a  
14 defined set of terms in the credit  
15 agreement reflecting lender's willingness  
16 to advance funds against certain categories  
17 of assets. It does not mean that it's a  
18 full measure of the value of those assets,  
19 not at all.  
20 Q. What is the full measure of the  
21 value of the assets?  
22 A. Well, the company is responsible  
23 for its financial statements. And so one  
24 would start with the book value that the  
25 company recites. But no lender will

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1  
2 advance funds to 100 percent of the  
3 categories of assets in a borrowing base.  
4 A credit agreement will have advanced rates  
5 applied to those values.  
6 Q. Same reason someone wouldn't give  
7 you a mortgage on probably 100 percent  
8 value of the house, correct?  
9 A. One could try, but one would not  
10 be successful.  
11 Q. Same general principle?  
12 A. General -- it's a lender cushion.  
13 Q. Thank you.  
14 Do lenders advance money based on  
15 general ledger entries?  
16 A. In part. I mean, the lenders  
17 might audit as far back as the general  
18 ledger, yes. I'm not a lender, but that  
19 would not surprise me.  
20 Q. To your knowledge, have you  
21 relied on any figures from any borrowing  
22 base certificate for Sears in offering any  
23 of your opinions in Exhibit 1?  
24 A. Not to my knowledge.  
25 Q. I'm going to show you what's been

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1  
2 marked as Exhibit 3.  
3 (Schulte Exhibit 3, Sears Holding  
4 Corp document entitled Exhibit A, 35  
5 pages, not Bates-stamped, marked for  
6 identification, as of this date.)  
7 MR. MOLONEY: There are  
8 highlights. I assume they are your  
9 highlights?  
10 MR. RUTHERFORD: That is how the  
11 document was produced to us.  
12 THE WITNESS: I don't have  
13 highlights on mine. Oh, yes I do. I  
14 have some.  
15 A. I have it, what is your question?  
16 Q. Are you able to identify what  
17 Exhibit 3 is?  
18 A. It says on its face that it's the  
19 borrowing base certificate as of October  
20 the 13th, 2018.  
21 Q. Is this a document that provided  
22 the basis for any information in your  
23 report, to your knowledge?  
24 A. Not directly, no.  
25 Q. What about indirectly?

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1  
2 A. Well, as I said to you, our  
3 report, my report, does not value anything  
4 on the borrowing base. So it's not relied  
5 upon in that sense.  
6 I'd be astonished if it had not  
7 been looked at, but it is not the basis of  
8 the analysis.  
9 Q. You'd said you'd be astonished if  
10 it had not been looked at, correct?  
11 A. I did say that.  
12 Q. And I presume you're referring to  
13 by your members of your team?  
14 A. That is correct.  
15 Q. Did you personally look at  
16 Exhibit 3 in connection with doing your  
17 work in this case?  
18 A. Only in the last 10 minutes.  
19 Q. Okay. In the context of this  
20 conversation?  
21 A. Yes.  
22 Q. If you will turn to page 3 of 35  
23 of Exhibit 3, let me know when you have  
24 that in front of you.  
25 A. Okay.

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1  
2 Q. And let me take a step back.  
3 The date October 13, 2018, how  
4 close in time is that to the petition date,  
5 if you know?  
6 A. It's within a week or two.  
7 Q. Within two days, isn't it?  
8 A. (Nodding.)  
9 Q. I'll represent to you it's within  
10 two days.  
11 A. Yes, okay.  
12 Q. Pretty close in time, isn't it?  
13 A. Very.  
14 Q. Do you see in the middle of  
15 page 3 of Exhibit 3, the entry for:  
16 Eligible credit card receivables?  
17 A. I see it.  
18 Q. And it's 54.8 million, correct?  
19 A. Yes.  
20 Q. But your report uses the  
21 64.2 million number from the general  
22 ledger, which is Exhibit 2, correct?  
23 A. Yes.  
24 Q. Why?  
25 A. Well, the word "eligible" is why.

Page 62

1  
2 Q. Why is that?  
3 A. Because lenders, in advancing  
4 funds against receivables, would typically  
5 have gone through a negotiation to define  
6 what's an eligible receivable and they  
7 would have taken out of creditworthiness,  
8 if you will, or out of the calculation of  
9 available funds, certain categories of  
10 receivables that they chose not to lend  
11 against.  
12 Q. Why wouldn't you want to do the  
13 same sort of -- strike that.  
14 Why wouldn't you perform the same  
15 level of scrutiny in valuing second lien  
16 debt that lenders would?  
17 MR. MOLONEY: Objection to the  
18 form of the question. Mischaracterizes  
19 the testimony, and it's argumentative  
20 and inaccurate, but if you can answer  
21 the question you may.  
22 THE WITNESS: I agree with all of  
23 that.  
24 BY MR. GENENDER:  
25 Q. Can you answer my question?

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1  
2 A. Yes. You're being foolish.  
3 The value of an asset is not the  
4 same as the amount that a lender will  
5 advance against the asset. Going back to  
6 your analogy about the mortgage, a lender  
7 will not extend full value but will have  
8 some rule of thumb or some negotiated  
9 amount or some policy that they will lend  
10 only a specified percentage of the fair  
11 market value. It doesn't mean that they  
12 wouldn't want to know what the fair market  
13 value is, they would, but it doesn't mean  
14 that they would advance the full measure of  
15 that.  
16 Q. Okay. I'll object to the  
17 nonresponsive portion of the answer.  
18 You used the higher of the two  
19 numbers, correct?  
20 A. Yes.  
21 Q. What is the date of Exhibit 2, if  
22 you know, the \$64.2 million figure for  
23 credit card debts in transit?  
24 At Exhibit 2, sir. The general  
25 ledger.

Page 64

1  
2 MR. MOLONEY: We'll tell you, you  
3 didn't use the one that we referred to.  
4 It doesn't have any Bates-stamp number.  
5 There was no date on it.  
6 MR. RUTHERFORD: It was produced  
7 in an Excel file, so it doesn't have  
8 Bates-stamps.  
9 MR. MOLONEY: The one we cited  
10 has a Bates-stamp number on it.  
11 MR. GENENDER: So does this.  
12 This is from an Excel file. I will  
13 represent that to you.  
14 MR. MOLONEY: So it's the same  
15 document?  
16 MR. GENENDER: It's a portion of  
17 the document, yes, sir.  
18 MR. MOLONEY: Okay.  
19 BY MR. GENENDER:  
20 Q. Do you know the date of the  
21 figure?  
22 A. It appears to be month end of  
23 September 2018.  
24 Q. Okay. And you'd agree with me,  
25 sir, that October 13th, 2018, is closer in

Page 65

1  
2 time to the petition date than month end  
3 2018, correct?  
4 A. Yes, sir.  
5 MR. MOLONEY: As I repeat, I  
6 don't know if this is the document that  
7 we relied on. There is no Bates-stamp  
8 number and I can't -- I'm not sure that  
9 that's correct.  
10 MR. GENENDER: Object to the  
11 sidebar.  
12 MR. MOLONEY: Well, no, it's not  
13 an objection -- it's an objection to --  
14 on the record to the fact that the  
15 document that you produced does not  
16 have a Bates-stamp number and we have  
17 no way -- the witness doesn't know --  
18 unless you -- whether this is the exact  
19 same document that's referred to in the  
20 footnote.  
21 MR. GENENDER: The document in  
22 the footnote speaks for itself.  
23 MR. MOLONEY: I agree with that.  
24 MR. GENENDER: And when compared  
25 with this, it will speak for itself.

Page 66

1  
2 MR. MOLONEY: It's the best  
3 record.  
4 BY MR. GENENDER:  
5 Q. Your report on page 9 references  
6 pharmacy scripts at \$72.8 million.  
7 Do you see that?  
8 A. Yes.  
9 Q. And you rely in footnote 14 on a  
10 schedule of estimated script asset value as  
11 of October 15, 2018.  
12 Do you see that?  
13 A. I do.  
14 Q. Have you personally reviewed that  
15 document?  
16 A. I've seen it, but I have not  
17 studied it.  
18 Q. Okay.  
19 (Schulte Exhibit 4, Valuation,  
20 not Bates-stamped, marked for  
21 identification, as of this date.)  
22 BY MR. GENENDER:  
23 Q. I'm handing you what's been  
24 marked Exhibit 4.  
25 Can you identify Exhibit 4 for

Page 67

1  
2 me?  
3 A. Well, it purports to be the  
4 valuation of prescriptions by store in the  
5 pharmacy of Sears stores.  
6 Q. Is this the document from which  
7 you derived \$72.8 million?  
8 A. I see at the top of the first  
9 page the same number, 72.8 million, and it  
10 must therefore be that this is the  
11 document.  
12 Q. Do you know the date of  
13 Exhibit 4?  
14 A. It must be a period of time close  
15 to the filing, but I don't have a precise  
16 date.  
17 Q. You don't know the date, do you?  
18 A. Correct.  
19 Q. The date is not reflected on the  
20 document, is it?  
21 A. It is not.  
22 Q. Have you reviewed any of the  
23 Tiger reports?  
24 A. No, not personally.  
25 Q. Have you laid eyes on them?

Page 68

1  
2 A. Yes. In passing, yes.  
3 Q. I show you what's been marked  
4 Exhibit 5.  
5 (Schulte Exhibit 5, Tiger Report  
6 dated 9/28/18 on Sears Holdings  
7 Corporation, Bates-stamped  
8 SEARS\_507B\_00001287 through 1344,  
9 marked for identification, as of this  
10 date.)  
11 BY MR. GENENDER:  
12 Q. Are you able to identify  
13 Exhibit 5 for me?  
14 A. Well, on its face it is an  
15 appraisal of Sears Holdings Inventory  
16 Appraisal as of an inventory date of  
17 October 6, 2018, and the basis of appraisal  
18 is net orderly liquidation value.  
19 Q. Which is referred to often as  
20 NOLV, correct?  
21 A. Constantly.  
22 Q. Okay. Do you know whether  
23 Exhibit 5, this Tiger report that you just  
24 identified, values the scripts in it?  
25 A. I don't know.

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1  
2 Q. Did you rely on Exhibit 5 in any  
3 way in assigning a value of the pharmacy  
4 scripts that's reflected on page 9 of your  
5 report, 72.8 million?  
6 A. If you read the report on page 9,  
7 it tells you the answer to that.  
8 Q. And the answer is?  
9 A. "ESL's counsel requested the  
10 debtors provide a calculation of value for  
11 the pharmacy scripts as of the petition  
12 date and received the file which appears to  
13 compute a value of \$72.8 million."  
14 Q. Okay.  
15 A. That's footnoted to footnote 14.  
16 I'm making the wild guess that  
17 it's not included in the Tiger report, but  
18 that's just a guess based upon the clear  
19 language in the report.  
20 Q. So my question is: Did you rely  
21 on Exhibit 5 in any way assigning a value  
22 of the pharmacy scripts as reflected on  
23 page 9 of your report, that being  
24 \$72.8 million?  
25 A. Probably not, because I doubt

Page 70

1  
2 it's in there.  
3 Q. Okay.  
4 A. By the way, it is common  
5 knowledge that pharmacy scripts are an  
6 asset of pharmacies. We owned a pharmacy  
7 company at one point and there are  
8 basically customers lists.  
9 MR. GENENDER: I'm going to  
10 object as nonresponsive. There is no  
11 question pending.  
12 BY MR. GENENDER:  
13 Q. Can you turn to page 8 of  
14 Exhibit 5, please?  
15 A. Yes.  
16 Q. Do you see the bottom right-hand  
17 corner where this report says, "Based on an  
18 estimated turn of \$5 per prescription, the  
19 script lists would have a value of up to  
20 \$27 million."  
21 Do you see that?  
22 A. Hold on, you're in the Tiger  
23 report?  
24 Q. Yes, sir, Exhibit 5.  
25 A. Sorry, I thought you were --

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1  
2 Q. Take your time. Page 8 of  
3 Exhibit 5. Lower right-hand corner.  
4 (Document review.)  
5 Q. I read the second sentence of  
6 that paragraph in the lower right-hand  
7 corner, "Based on an estimated return of \$5  
8 per prescription, the script lists have a  
9 value of up to \$27 million."  
10 Do you see that?  
11 A. Yes.  
12 Q. Did you rely upon that statement  
13 in preparing your report?  
14 A. It appears that we did not.  
15 Q. Thank you.  
16 You relied upon the \$72.8 million  
17 number instead, which is contained in  
18 Exhibit 4, correct?  
19 A. We relied upon your client's  
20 representation.  
21 MR. GENENDER: Objection.  
22 Nonresponsive. Move to strike.  
23 BY MR. GENENDER:  
24 Q. Exhibit 14, sir -- I'm sorry.  
25 Your report, page 9, footnote 14, cites the

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1  
2 schedule, which is Exhibit 4 to your  
3 deposition, correct?  
4 A. You've confused me.  
5 Q. Exhibit 4 to your -- to this  
6 deposition is Exhibit 4 to the deposition,  
7 sir. I'm showing it to you. That right  
8 there (indicating).  
9 A. Got it.  
10 Q. That is the basis for  
11 72.8 million?  
12 A. It is. It appears to be.  
13 Q. And it doesn't have a date on it,  
14 does it?  
15 A. It does not.  
16 Q. And you don't know the date, do  
17 you?  
18 A. I do not.  
19 Q. Can you read for the record the  
20 full text of footnote 14 in your report on  
21 page 9.  
22 A. Footnote 14 reads: "Schedule of  
23 estimated script asset value as of  
24 October 15, 2018."  
25 Q. What is your basis, as you sit

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1  
2 here, for knowing --  
3 MR. MOLONEY: Again. I have an  
4 objection. That this is not --  
5 MR. GENENDER: Excuse me. Excuse  
6 me, Counsel. I'm asking --  
7 MR. MOLONEY: This is not the  
8 same document that's referenced here.  
9 There is no Bates number. So we have  
10 no idea.  
11 MR. GENENDER: Counsel, I would  
12 like to ask my question without  
13 interruption.  
14 BY MR. GENENDER:  
15 Q. Mr. Schulte, what is your basis  
16 for saying in footnote 14 that the schedule  
17 of estimated script value as of October --  
18 is as of October 15, 2018?  
19 MR. MOLONEY: I'm sorry?  
20 THE WITNESS: Can I use my guide?  
21 I have a guide here of all these  
22 documents, which you don't have. Can  
23 we give him one?  
24 MR. MOLONEY: Yes, they can have  
25 one.

Page 74

1  
2 MR. GENENDER: I have no idea  
3 what you're talking about. Do you want  
4 to hand it to me?  
5 MR. MOLONEY: Yes.  
6 (Handing.)  
7 THE WITNESS: In this case it  
8 doesn't help.  
9 MR. MOLONEY: No.  
10 (Handing.)  
11 MR. MOLONEY: It's just an  
12 appendix to make it easy to figure out  
13 if you showed him a document to speed  
14 it up for us, so we wouldn't spend a  
15 lot of time going through the --  
16 MR. GENENDER: Who prepared --  
17 MR. MOLONEY: It was prepared by  
18 Cleary.  
19 MR. GENENDER: I'm going to mark  
20 this.  
21 MR. MOLONEY: It's just based  
22 on -- I can say for the record, all it  
23 is, is it's just -- we took the  
24 documents that were listed in the  
25 appendix and we went to kind of cross

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1  
2 reference it in a way to perhaps make  
3 this morning more efficient.  
4 MR. GENENDER: Terrific. Can I  
5 have one more copy of it? Do you have  
6 an extra copy?  
7 MR. MOLONEY: Sure.  
8 MR. GENENDER: Give that to me.  
9 BY MR. GENENDER:  
10 Q. I'm handing you what's been  
11 marked as Exhibit --  
12 A. I have it.  
13 Q. You may have it. I just marked  
14 as Exhibit 6 the document that your counsel  
15 just provided to me.  
16 A. Yes.  
17 (Schulte Exhibit 6, Index to  
18 Appendix B of Expert Report of David  
19 Schulte, not Bates-stamped, marked for  
20 identification, as of this date.)  
21 BY MR. GENENDER:  
22 Q. Is that a document that you  
23 personally prepared?  
24 A. Did I prepare this document? No,  
25 sir.

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1  
2 Q. Okay. Who did?  
3 A. Cleary did.  
4 Q. What does it reflect?  
5 A. It is a way to move from the  
6 documents that are recited or footnoted in  
7 the report to their origin.  
8 Q. When was it prepared?  
9 A. This was prepared yesterday.  
10 MR. MOLONEY: Yes, about  
11 six o'clock yesterday.  
12 BY MR. GENENDER:  
13 Q. Mr. Schulte, I'm deposing you,  
14 not your lawyer.  
15 A. Yes, I answered yesterday.  
16 Q. Did you prepare -- did you have  
17 any role in preparing Exhibit 6?  
18 A. No.  
19 Q. Can you swear to its accuracy?  
20 A. Can I swear to its accuracy? Of  
21 course not.  
22 Q. Thank you.  
23 What is your basis in footnote 14  
24 for stating that the schedule referenced is  
25 as of October 15, 2018? As you sit here



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1  
2 today, do you have one?  
3 A. I don't know what Sears, with  
4 this Bates number -- I don't know what that  
5 is. It's not on this cross-referencing  
6 list, so I don't know.  
7 Q. I want to go back to page 9 of  
8 your report, the first paragraph.  
9 A. The indented paragraph or the  
10 first --  
11 Q. No, the first full paragraph  
12 under the: Value Of the Inventory  
13 Collateral.  
14 Do you see that?  
15 A. Yes, I do.  
16 Q. "The appropriate" -- you say,  
17 "The appropriate methodology to value  
18 inventory is on the basis of its intended  
19 use."  
20 Do you see that?  
21 A. Yes.  
22 Q. You say, "If a retailer is  
23 operating in the normal course as a  
24 going-concern, it would have ample time and  
25 resource to sell most of its inventory?"

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1  
2 Did I read that correctly?  
3 A. You did. You're doing well.  
4 Q. Thank you.  
5 Your next sentence is the one I  
6 want to ask you a question about.  
7 You say, "But if it is  
8 liquidating, there may be the time and cost  
9 pressures that require inventory to be sold  
10 at a discount."  
11 Correct?  
12 A. That's what it says.  
13 Q. And you agree with that, don't  
14 you?  
15 A. Yes.  
16 Q. Would you agree that if Sears had  
17 liquidated, it would have been an  
18 unprecedented retail liquidation? Would  
19 you agree with that?  
20 A. I don't know that it would be  
21 unprecedented.  
22 Q. Are you aware of a company larger  
23 than Sears was in October of 2018 that had  
24 liquidated that was a retailer?  
25 A. No.

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1  
2 Q. Thank you. There would have been  
3 uncertainty and risk associated with a  
4 liquidation, correct?  
5 A. Depending on how the liquidation  
6 was done.  
7 Q. Well --  
8 A. Well, I mean, yes, depending on  
9 how the liquidation was done.  
10 Q. Sure. It's possible that overall  
11 recovery would have been reduced in a  
12 liquidation, correct?  
13 A. Compared to what.  
14 Q. Compared to a going-concern sale?  
15 A. Yes, it's likely.  
16 Q. Thank you.  
17 If there were a fire sale of  
18 assets, recovery margins would be lower,  
19 wouldn't they?  
20 A. It depends.  
21 Q. They could be lower, couldn't  
22 they?  
23 A. They could be. One would -- one  
24 would expect, and that's what the text  
25 says, that if there were time pressures and

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1  
2 if there was a fire sale, which is your  
3 hypothesis, that they would be lower.  
4 Q. And if it were -- there were a  
5 day one liquidation of Sears, its inventory  
6 would, quote, unquote, flood the market,  
7 wouldn't it?  
8 A. I don't know that.  
9 Q. Okay. But you're familiar with  
10 the phrase "flood the market"?  
11 A. I've heard that.  
12 Q. Okay. You know what it means?  
13 A. Yes.  
14 Q. Puts more supply than there would  
15 be demand.  
16 A. I got that.  
17 Q. Which as a matter of basic  
18 economics would lower the price, wouldn't  
19 it?  
20 A. Depending upon how it was done.  
21 Q. Okay. There could be an  
22 increased -- if Sears liquidated, there  
23 could be an increased risk of vendor  
24 flight.  
25 Would you agree?



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1  
2 MR. MOLONEY: Sorry. What do you  
3 mean by vendor flight?  
4 A. I don't know what you're talking  
5 about.  
6 Q. Vendors --  
7 A. I don't know what you're talking  
8 about.  
9 Q. I understand -- and I asked you  
10 to let me know when you don't understand a  
11 question and we've gone over an hour and I  
12 finally got one that you didn't understand,  
13 so I feel very accomplished.  
14 I'm going to ask it better.  
15 A. I am happy to make you feel  
16 accomplished.  
17 Q. Well, I need all the help I can  
18 get.  
19 A. Yes, sir.  
20 Q. In a liquidation, would you agree  
21 that there is a risk that vendors who  
22 supply product to a company could stop  
23 doing business with the company?  
24 A. Yes.  
25 Q. And in a liquidation would you

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1  
2 also agree that certain receivables can be  
3 harder to collect than they otherwise would  
4 be were the business a going-concern?  
5 A. Depending on the nature of the  
6 receivables. I would not think that as to  
7 credit card receivables.  
8 Q. What about other kinds of --  
9 sorts of receivables; it could be?  
10 A. Sure.  
11 Q. Would you agree that in a  
12 liquidation that there is a risk of losing  
13 employees?  
14 A. Sure.  
15 Q. Would you agree that in a  
16 liquidation there is a risk of losing  
17 senior management?  
18 A. I would agree that in a  
19 liquidation a lot of things would be  
20 different and they would be on the whole  
21 harmful to the company.  
22 Q. And one of the harms would be  
23 inefficiencies in operating the company,  
24 wouldn't they?  
25 A. Not necessarily.

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1  
2 Q. It could be, couldn't it?  
3 MR. MOLONEY: Objection to the  
4 form of the question.  
5 A. It's pretty speculative.  
6 Q. If you lose key employees and key  
7 senior management, that can create  
8 inefficiencies in how a business is run,  
9 couldn't it?  
10 A. When you're asking about "could,"  
11 you're presuming a lot. So I don't want to  
12 answer that because -- except to say  
13 perhaps.  
14 Q. It's a risk, isn't it?  
15 A. Perhaps.  
16 Q. Okay. And in a liquidation there  
17 are trustee -- liquidating trustees charge  
18 fees, don't they?  
19 A. If there was a liquidating  
20 trustee, yes.  
21 Q. Your report on page 10 references  
22 three different methodologies for valuing  
23 both the going-out-of-business and  
24 Go-Forward stores, correct?  
25 A. Yes.

Page 84

1  
2 Q. And would you agree that to  
3 conduct your valuation you backed out the  
4 book value of inventory sold in the GOB  
5 stores, correct?  
6 A. We backed it out from the  
7 petition date financial statement of the  
8 book value of the company's inventory.  
9 Q. And the book value of inventory  
10 on the petition date that you used was  
11 2,690,800,000, correct?  
12 A. Yes.  
13 Q. Do you know where that number  
14 came from?  
15 A. I assume it came from the court  
16 filings. Let me look. There is a footnote  
17 here. Hold on.  
18 (Document review.)  
19 A. It isn't separately footnoted. I  
20 assume that it came from the company's  
21 filing, whether it was as of petition date  
22 or a few days before, I'm not sure.  
23 Q. Do you know for certain?  
24 A. No. The only thing that was  
25 shown me is the -- October 15 was the date,

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1  
2 and as we established that was -- or 13 --  
3 that was two days before the filing. We  
4 covered that before.  
5 Q. In terms of the borrowing base  
6 certificate, which is Exhibit 3, correct?  
7 A. If that's where it came from.  
8 Q. Well, the borrowing base  
9 certificate is marked as Exhibit 3 to your  
10 deposition. I'll tell you that. That's  
11 the October 13 document.  
12 A. I'm not quite sure where it came  
13 from, whether it came from the filing or  
14 whether it came from the chief financial  
15 officer's declaration. I'm not sure.  
16 Q. Did it come from the borrowing  
17 base certificate, if you know?  
18 Let me direct you to page 3 of 35  
19 of the borrowing base certificate to see if  
20 that refreshes your memory or provides you  
21 new information.  
22 MR. MOLONEY: Or different  
23 information, correct?  
24 MR. GENENDER: New information  
25 could be different information.

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1  
2 A. Well, I can find on the exhibit  
3 you directed me on page 3 an entry that  
4 says, "Total stock ledger inventory" and  
5 it's two billion, six ninety point eight.  
6 Q. The same number?  
7 A. That's in millions.  
8 Q. The same number that you used on  
9 the top of page 10 of your report, book  
10 value of inventory on petition date,  
11 correct?  
12 A. Yes.  
13 Q. And that same number is used on  
14 page 3 of 35 of the borrowing base  
15 certificate which is Exhibit 3, correct?  
16 A. This is the borrowing base  
17 certificate. What is your question?  
18 Q. That is the same number that you  
19 used -- in your report, is the same number  
20 that's listed on page 3 of the borrowing  
21 base certificate for total stock ledger  
22 inventory, correct?  
23 A. Yes.  
24 Q. And you'd agree that the  
25 borrowing base is a representation of the

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1  
2 assets that lenders would be willing to  
3 lend against, correct?  
4 A. Yes.  
5 Q. The general ledger does not  
6 exclude ineligible inventory, does it?  
7 A. It does not exclude it, correct.  
8 Q. The borrowing base we're looking  
9 at, which is Exhibit 3 to this deposition,  
10 excludes roughly \$300 million of ineligible  
11 inventory, doesn't it?  
12 A. It's less than that.  
13 Q. Well, let's look.  
14 Total stock ledger inventory on  
15 the borrowing base certificate page 3,  
16 Exhibit 3, 2.69 billion.  
17 Do you see that?  
18 A. Yes.  
19 Q. And then if you go down about  
20 half the page, it says, "Net eligible  
21 inventory" and that number is  
22 2.391 billion, correct?  
23 A. Yes.  
24 Q. That's a delta of pretty close to  
25 \$300 million, isn't it?

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1  
2 A. Yes, sir.  
3 Q. Okay. Thank you.  
4 And if you look between those two  
5 numbers, the things that are excluded  
6 include inventory paid for in advance of  
7 shipment, 83.7 million, correct?  
8 A. Yes.  
9 Q. That excludes as ineligible  
10 inventory that had already been sold,  
11 correct?  
12 A. No, I don't think so.  
13 Q. Inventory paid in advance of  
14 shipment, that is inventory that is already  
15 sold, isn't it?  
16 A. No, it may be a C.O.D. It may be  
17 inventory that the company has ordered  
18 where its vendor has required payment in  
19 advance. I don't know exactly what's in  
20 it, but your supposition is something I  
21 don't share.  
22 Q. Well, you didn't take into  
23 account the delta between 2.69 million and  
24 2.39 -- excuse me. You didn't take into  
25 account the delta between \$2.69 billion and

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1  
2 \$2.391 billion reflected on page 3 of the  
3 borrowing base certificate, correct?  
4 A. We took the general ledger number  
5 for inventory and we did not adjust it  
6 through the eyes of a lender or through any  
7 particular credit agreement definitions.  
8 Q. Do you see on page 3 of the  
9 borrowing base certificate where it says,  
10 "Total imported in transit inventory"?  
11 A. I do see that.  
12 Q. Okay. And then above it says,  
13 "In transit reserved."  
14 Do you see that?  
15 A. Yes.  
16 Q. Did you take into account those  
17 figures in preparing any of your opinions  
18 in this case?  
19 A. It's the same answer I just gave  
20 you. We did not take any lender reserves  
21 and deductions into account. Those are  
22 defined for a different reason.  
23 Q. Are these C.O.D. -- are those --  
24 are the -- do you know if the entries for  
25 total imported in transit inventory are

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1  
2 C.O.D.?  
3 A. I'm not sure.  
4 Q. The inventory paid for in advance  
5 of shipment, the \$83.7 million number  
6 towards the top of page 3 of Exhibit 3, why  
7 do you believe those were C.O.D.?  
8 MR. MOLONEY: I don't think he  
9 said they were C.O.D., but you can  
10 re-answer the question again, but I  
11 think you misstated his prior  
12 testimony. Object.  
13 MR. GENENDER: Object to the  
14 speaking objections.  
15 A. I'm speculating, but on the face  
16 of it, it's inventory paid for in advance  
17 of shipment. It sounds suspiciously like  
18 COD, but I'm speculating.  
19 Q. But by your own testimony in  
20 saying you're speculating, you don't have  
21 personal knowledge, correct?  
22 A. Personal knowledge? I don't have  
23 personal knowledge of anything on this  
24 page.  
25 Q. And you don't have any certain --

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1  
2 and you don't have a certain opinion if  
3 you're speculating, correct?  
4 A. It's not something I ever  
5 considered before your questions began.  
6 Q. Do you have any reason to doubt  
7 the accuracy of the borrowing base  
8 certificate, which is Exhibit 3?  
9 A. No.  
10 Q. Thank you.  
11 Just to be clear, in performing  
12 your calculations of valuing the inventory  
13 on the petition date you did not take into  
14 account the approximately \$300 million  
15 reduction of net eligible inventory  
16 reflected on page 3 of the borrowing base  
17 certificate, which is prepared as of  
18 October 13, 2018, correct?  
19 A. Correct.  
20 Q. Thank you.  
21 Your footnote 18, also on page  
22 10, states that you rely on a document  
23 called: Summary of GOB Recovery Rates Post  
24 Chapter 11 Bankruptcy Filing?  
25 Do you see that?

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1  
2 A. I do.  
3 Q. Is that a document that you  
4 reviewed in preparing for today's  
5 deposition?  
6 A. Other than in passing, no.  
7 (Schulte Exhibit 7, GOB Inventory  
8 Recovery Rates, Bates-stamped  
9 ESL\_507B00000002 through 3, marked for  
10 identification, as of this date.)  
11 BY MR. GENENDER:  
12 Q. Let me hand you what has been  
13 marked as Exhibit 7, and it's a two-sided  
14 document and your counsel will be happy to  
15 know it has Bates labels printed on it as  
16 opposed to from an Excel page.  
17 MR. MOLONEY: Okay. There is a  
18 reason why I objected. I mean, from  
19 the metadata on the Excel page you may  
20 be able to figure out dates, right.  
21 MR. GENENDER: Tom, here is the  
22 deal, we're going to -- we can go back  
23 and after this deposition do a  
24 side-by-side and we'll address any  
25 potential issue you have about those --

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1  
2 where those documents came from, and  
3 probably better to do it that way than  
4 on the record, fair enough?  
5 MR. MOLONEY: Okay.  
6 MR. GENENDER: Thank you.  
7 BY MR. GENENDER:  
8 Q. You have Exhibit 7 in front of  
9 you?  
10 MR. MOLONEY: Well, that is not  
11 the one we used. It's okay. This is  
12 exactly the problem we had. We  
13 actually printed out the document and  
14 it's not the same one you handed him.  
15 This is the document that we used. You  
16 want to mark the document we used?  
17 MR. GENENDER: Would you turn  
18 over the back of the exhibit, turn it  
19 over, please?  
20 MR. MOLONEY: It's still not the  
21 document we used.  
22 BY MR. GENENDER:  
23 Q. Your Exhibit 18 states it refers  
24 to ESL 507(B), a bunch of zeros and the  
25 number 2?

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1  
2 MR. MOLONEY: Yeah, and this is  
3 the Excel sheet. When we printed out  
4 the Excel sheet.  
5 MR. GENENDER: Excuse me. I was  
6 talking to the witness.  
7 MR. MOLONEY: Okay.  
8 BY MR. GENENDER:  
9 Q. Do you see that very Bates number  
10 ESL 507(B), a bunch of zeros and 2 is what  
11 is on the first page, lower right-hand  
12 corner, of Exhibit 7, correct?  
13 A. I see that.  
14 Q. Is this not a document -- and  
15 this document is -- entitled Exhibit 7, is  
16 entitled: GOB Inventory Recovery Rates,  
17 correct?  
18 A. That is what it says.  
19 Q. It does not say post Chapter 11  
20 bankruptcy filing, does it?  
21 A. Well, it starts with 2014 which  
22 is distinctly pre-bankruptcy filing, yes.  
23 Q. All right. And it goes through  
24 2018 year-to-date.  
25 Do you see that?

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1  
2 A. I do.  
3 Q. Do you know where -- what month  
4 in 2018 year-to-date it goes through?  
5 A. I see no date here. On the other  
6 side.  
7 MR. MOLONEY: The footnote  
8 reference may just be wrong. I can  
9 give you the document which --  
10 MR. GENENDER: I'd love to see it  
11 because I don't -- I'd like to see if  
12 it's something that we haven't seen.  
13 If it's been produced.  
14 MR. MOLONEY: I think you have  
15 it.  
16 (Handing.)  
17 MR. GENENDER: Thank you.  
18 (Document review.)  
19 MR. GENENDER: In the interest of  
20 time I'm going to show this to my  
21 colleagues and then we'll come back to  
22 it, okay?  
23 MR. MOLONEY: Okay.  
24 MR. GENENDER: Fair enough.  
25 MR. MOLONEY: It could have been

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1  
2 our error, in which case we apologize.  
3 MR. GENENDER: No, the Bates  
4 number is what it is, and I get that  
5 mistakes happen. I just want to keep  
6 moving.  
7 BY MR. GENENDER:  
8 Q. If you look at Exhibit 7, if you  
9 turn it over, on the back page it's Bates  
10 labeled: 3 ESL 507(b)3.  
11 A. I see it.  
12 Q. The last line it says, "June  
13 through September, begins, ends."  
14 You see September is the last  
15 date?  
16 A. I see it.  
17 Q. All right. And these are  
18 historical numbers on Exhibit 7, aren't  
19 they?  
20 A. That's what they seem to be, yes.  
21 Q. There is nothing about Exhibit 7  
22 that reflects GOB recovery rates post  
23 Chapter 11 bankruptcy filing, correct?  
24 A. Well, hold on. Sears was closing  
25 stores for years. So this is their --

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1  
2 appears to be their accounting of their  
3 experience in stores that they closed where  
4 they ran going-out-of-business sales.  
5 They were not Chapter 11 because  
6 this all preceded Chapter 11.  
7 Q. That's my point. I understand  
8 that. It might be historical, but there  
9 was nothing about this document, Exhibit 7,  
10 that reflects GOB recovery rates post  
11 Chapter 11, correct?  
12 A. That's correct.  
13 Q. Thank you.  
14 MR. GENENDER: Why don't we take  
15 a break and I would like to look at  
16 that the document.  
17 MR. MOLONEY: Okay. Take a  
18 break.  
19 (Recess is taken.)  
20 BY MR. GENENDER:  
21 Q. Mr. Schulte, we're back on the  
22 record. You understand that you are still  
23 under oath?  
24 A. Yes, sir.  
25 Q. Thank you.

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1  
2 to your deposition, right?  
3 A. Yes.  
4 Q. Why did you rely on the Tiger  
5 appraisal in this instance but not in  
6 connection with the pharmacy scripts'  
7 valuation where it was capped at  
8 27 million?  
9 A. The value of the scripts came  
10 from the debtor. It was specifically  
11 requested and it came specifically from  
12 them.  
13 Q. But you had --  
14 A. Tiger -- excuse me. Let me  
15 answer your question.  
16 Q. Please, please. Of course.  
17 A. Tiger values it much more  
18 globally based upon their general  
19 experience of valuing pharmacy scripts.  
20 Q. But you relied -- but to be  
21 clear, you relied on Tiger for certain  
22 things and not for others, correct?  
23 A. Sure.  
24 Q. Thank you.  
25 For Going-Concern stores, you

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1  
2 In your report, in your  
3 calculation of gross retail proceeds, you  
4 apply a 37.7 percent markup to the book  
5 value of 2.039 billion in Go-Forward store  
6 inventory, correct?  
7 I'm looking in the middle of the  
8 page on page 10 of your report?  
9 A. All right. I'm on page 10. Tell  
10 me again, please.  
11 Q. In your report, in your gross --  
12 for gross retail proceeds you apply a 37.7  
13 percent markup to the book value of  
14 2.039 billion, book value of inventory?  
15 A. Yes.  
16 Q. Okay.  
17 A. Yes.  
18 Q. And in footnote 20 you cite to  
19 the Tiger appraisal, correct?  
20 A. Yes.  
21 Q. And we've talked about that Tiger  
22 appraisal and we've marked it already as an  
23 exhibit to your deposition, correct?  
24 A. Yes.  
25 Q. And to be clear, it's Exhibit 5

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1  
2 used book value, correct?  
3 A. Yes, we looked at three different  
4 approaches, and in the end we settled on  
5 book value.  
6 Q. That book value does not include  
7 any four-wall costs of those stores,  
8 correct?  
9 A. That is correct.  
10 Q. It does not include corporate  
11 overhead, correct?  
12 A. Correct.  
13 Q. And using book value does not  
14 account for the costs associated with  
15 selling the inventory, correct?  
16 A. Correct. The accounting  
17 convention is that the inventory is  
18 recorded at the lower of cost or realizable  
19 value.  
20 Q. Okay. But just to be clear, the  
21 book value that you all used did not take  
22 into account the costs associated with  
23 selling the inventory, correct?  
24 A. Correct.  
25 Q. And last, the book value that you

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Page 100

Page 101

1  
2 all used did not take into account the  
3 costs associated with storing the inventory  
4 until it sold, correct?  
5 A. I don't know how that's accounted  
6 for.  
7 Q. You don't know whether that was  
8 accounted for or not?  
9 A. Correct. You may be right. I  
10 just don't know.  
11 Q. Okay. I don't hear that are  
12 enough, people telling me I may be right,  
13 Mr. Schulte, so I appreciate that.  
14 A. I'll try not to make a habit of  
15 it.  
16 Q. Most people don't make a habit of  
17 it.  
18 You offer an opinion on page 13  
19 of your report that the second liens were  
20 oversecured as of the petition date,  
21 correct?  
22 A. That is correct.  
23 Q. Do you stand by that position, as  
24 you sit here today?  
25 A. I do.

Page 102

1  
2 Q. That opinion is based in part on  
3 a buildup that includes \$115.5 million of  
4 cash, correct?  
5 A. Yes.  
6 Q. It includes \$72.8 million of  
7 pharmacy scripts, correct?  
8 A. Yes.  
9 Q. And \$11.9 million of pharmacy  
10 receivables; is that also correct?  
11 A. Yes, that's all on page 13 of the  
12 report.  
13 Q. Thank you.  
14 And that opinion is based, at  
15 least in part, on a buildup that includes  
16 the book value of the inventory, correct?  
17 A. Correct.  
18 Q. And that book value of the  
19 inventory includes 300 million worth of  
20 assets that are not included in the  
21 borrowing base certificate which we talked  
22 about earlier, which is Exhibit 3, correct?  
23 A. Yes, sir.  
24 MR. MOLONEY: Objection to the  
25 form of the question.

Page 103

1  
2 You have to go slower, okay, so I  
3 can object.  
4 THE WITNESS: I'm sorry.  
5 BY MR. GENENDER:  
6 Q. And your opinion is based, at  
7 least in part, on the assumption that the  
8 letters of credit are not drawn against,  
9 correct?  
10 A. On the fact; not the assumption.  
11 On the fact that they were not drawn  
12 against.  
13 Q. And there is \$395 million of  
14 letters of credit, correct?  
15 A. Correct.  
16 Q. You also contend that the 85  
17 percent value that Mr. Griffith applies to  
18 the inventory in his calculation is nothing  
19 more than what you call, quote, deal lingo,  
20 end quote; is that right?  
21 A. Well, you put a pejorative on it  
22 when you say "nothing more than." I yield  
23 to no man in my respect for Mr. Griffith,  
24 but yes.  
25 Q. But "deal lingo" is your term,

Page 104

1  
2 right?  
3 A. Yes.  
4 Q. And to be fair, page 23 of your  
5 report says, "Accordingly, the 'deal lingo'  
6 of 85 percent to the inventory another  
7 collateral does not necessarily mean that  
8 it" -- "that was its value as of the  
9 Transform transaction," correct?  
10 A. Well, not only that, it does not  
11 necessarily mean that's the price paid.  
12 Q. But you, in your 24-page  
13 single-spaced report, you -- in this  
14 particular instance you used the words  
15 "does not necessarily mean."  
16 A. Fine.  
17 Q. As opposed to you know how to  
18 say, does not mean, correct?  
19 A. Well, the answer is seven. There  
20 are seven angels that dance on the head of  
21 that pin.  
22 Q. But there is a difference between  
23 "does not mean" and "does not necessarily  
24 mean," isn't there?  
25 A. I'm not sure there is any



Page 105

1  
2 difference used in the way that this report  
3 has used it.  
4 Q. Okay. You acknowledge that --  
5 strike that.  
6 Have you reviewed the APA, the  
7 Asset Purchase Agreement?  
8 A. Yes.  
9 Q. Have you studied it?  
10 A. No.  
11 Q. Have you reviewed the provisions  
12 whereby the 85 percent value that  
13 Mr. Griffith relies upon were derived?  
14 MR. MOLONEY: Objection to the  
15 form of the question. We don't have  
16 this report in front of us, so I don't  
17 know there are provisions. Are you  
18 representing there are some provisions?  
19 MR. GENENDER: We'll fix that,  
20 Tom.  
21 BY MR. GENENDER:  
22 Q. I'm handing you, Mr. Schulte,  
23 what's been marked as Exhibit 8?  
24 A. Okay.  
25 (Schulte Exhibit 8, Asset

Page 106

1  
2 Purchase Agreement dated as of 1/17/19  
3 by and among Transform Holdco LLC,  
4 Sears Holdings Corporation and its  
5 subsidiaries party hereto, not  
6 Bates-stamped, marked for  
7 identification, as of this date.)  
8 BY MR. GENENDER:  
9 Q. Can you identify Exhibit 8 as the  
10 Asset Purchase Agreement dated as of  
11 January 17, 2019, by and among Transform  
12 Holdco, Sears Holding Corporation and its  
13 subsidiaries, parties hereto?  
14 A. Yes, sir.  
15 Q. And is this what is often  
16 referred to as the APA?  
17 A. Yes, sir.  
18 Q. All right.  
19 Now, how carefully have you  
20 reviewed the APA?  
21 A. I looked at it.  
22 Q. Okay.  
23 A. I looked at the provisions that  
24 we were relying on, more than the whole of  
25 the document.

Page 107

1  
2 Q. Can you turn to page 51, please.  
3 A. Yes.  
4 Q. Do you see there is cash amount  
5 equal to \$1,408,450,000?  
6 A. Yes.  
7 Q. Little romanette (i)?  
8 A. Yes.  
9 Q. If you'll turn to page 102,  
10 section 10.9, relating to inventory and  
11 receivables.  
12 Do you see that?  
13 MR. MOLONEY: I'm sorry. Where  
14 are we now?  
15 THE WITNESS: 102.  
16 Q. Page 102, section 10.9.  
17 (Document review.)  
18 A. Yes.  
19 Q. Do you see there is a requirement  
20 that the debtors -- strike that.  
21 Do you see there is a requirement  
22 on the debtors to deliver an aggregate of  
23 \$1,657,000 in aggregate inventory, credit  
24 card accounts receivable, and pharmacy  
25 receivables?

Page 108

1  
2 A. That is not what it says. It  
3 says "at least."  
4 Q. Okay. That 1.657 billion of  
5 those components, correct?  
6 A. Yes.  
7 Q. As a matter of math, would you  
8 agree that 1,408,450,000 divided by  
9 1.657 billion is 85 percent?  
10 A. You're asking me an arithmetic  
11 question?  
12 I have to take my calculator out,  
13 but I'm willing to go with you on that.  
14 Q. It is what it is, right?  
15 A. It is what it is, but it's not  
16 what you're trying to say --  
17 Q. The math is 85 percent, isn't it?  
18 A. As long as you let me recognize  
19 the "at least," fine.  
20 Q. Okay. Well, if it's more than  
21 1.657 billion, then the percentage goes  
22 down, right? Because that is the  
23 denominator number?  
24 A. No. It looks like they moved  
25 other inventory to other places, but --

Page 109

1  
2 "sellers may reduce such amounts to be  
3 equal to."  
4 Q. If it's more than 1.657 billion,  
5 you understand that that surplus goes back  
6 to the debtor, don't you, under the APA?  
7 Or do you know that?  
8 A. Yes.  
9 Q. You do know that? Okay. Thank  
10 you.  
11 Your report on page 14 -- well,  
12 let me take a step back.  
13 What impact would your conclusion  
14 be as to whether the second lienholders  
15 were oversecured -- strike that.  
16 Have you analyzed the impact on  
17 your opinion that the second lienholders  
18 were oversecured as of the petition date if  
19 you had valued the inventory at 85 percent  
20 instead of the valuation you used?  
21 A. I think we, somewhere, actually  
22 calculated. There is a big difference.  
23 \$300 million or something like that.  
24 Q. The inventory that was sold as of  
25 the time of the APA, when the APA closed in

Page 110

1  
2 February of 2019, was of a smaller  
3 footprint of profitable stores, correct?  
4 Is that your understanding?  
5 A. Compared to?  
6 Q. Petition date.  
7 A. Yes.  
8 Q. Thank you.  
9 Would you agree as a general  
10 proposition that if you have a  
11 poor-performing store and it goes into  
12 liquidation, that its inventory may not  
13 return a wonderful return?  
14 A. No.  
15 Q. You don't agree with that?  
16 A. No.  
17 Q. You think a poor-performing store  
18 is going to have -- when you liquidate the  
19 inventory from a poorly performing store,  
20 that it's going to do as well as when you  
21 liquidate the inventory from a  
22 strong-performing store?  
23 A. You haven't given me enough facts  
24 to make that opinion.  
25 Q. Okay. Your report on page 14

Page 111

1  
2 addresses the calculation -- addresses how  
3 the second lien creditors would have fared  
4 if the collateral was liquidated on the  
5 petition date.  
6 Do you see that under Roman  
7 numeral 4 on page 14?  
8 A. Yes.  
9 Q. And you considered four data  
10 sources to estimate the hypothetical  
11 recovery if the inventory liquidated on day  
12 one, correct?  
13 A. There is a Tiger appraisal that  
14 is recited.  
15 Q. Yes. That's Exhibit 5, right?  
16 A. Yes. And then there is the  
17 debtors' own liquidation analysis. And  
18 then there are the bids of people in the  
19 business of liquidating retailer  
20 inventories. And then there is the  
21 company's historical experience.  
22 So if that's what you're counting  
23 up, then yes, I agree.  
24 Q. Okay. Thank you.  
25 If you look at the Tiger report,

Page 112

1  
2 which is Exhibit 5 to your deposition, if  
3 you go to the page of it that's numbered  
4 1308 in the lower right-hand corner.  
5 (Document review.)  
6 A. I'm sorry. 1308?  
7 Q. In the lower right-hand corner,  
8 the tracking number.  
9 (Document review.)  
10 A. Yes.  
11 Q. There is a line on the left,  
12 "Estimated total company GOB net recovery  
13 before other adjustments and corporate  
14 expenses." And then you go three -- three  
15 columns over and that's 94.4 percent,  
16 correct?  
17 A. You were reading correctly. It's  
18 the fourth line down.  
19 Q. Yes, sir. Three columns over  
20 from the left, four lines down, right?  
21 A. Yes, sir.  
22 Q. That is the 94.4 percent that you  
23 reference in your report, isn't it? The  
24 last line of text on page 14 of your  
25 report, correct?

Page 113

1  
2 A. Yes, sir.  
3 Q. And your report, to be fair,  
4 says, "94.4 percent of costs before taking  
5 into account corporate" -- "account  
6 corporate overhead," right?  
7 A. Correct.  
8 Q. And if you look at the Tiger  
9 report, you go below there, and there are  
10 deductions from the 94.4 percent for  
11 royalty payments of .2 percent, right?  
12 A. I see it.  
13 Q. And there is another deduction  
14 for estimated base liquidation fee of .8  
15 percent, correct?  
16 A. Yes.  
17 Q. And there is another deduction  
18 for corporate expenses of 2.1 percent,  
19 correct?  
20 A. Yes.  
21 Q. Those deductions all come from  
22 the 94.4 that your report references,  
23 correct?  
24 A. Yeah, but you're deriving a  
25 different number from the one that I was

Page 114

1  
2 using. I mean, yes, you've read the  
3 exhibit correctly.  
4 Q. Yes.  
5 To be fair, on top of page 15 you  
6 make those same calculations in your  
7 report, right?  
8 A. Yes.  
9 Q. Would you agree it as a general  
10 proposition that the value of something is  
11 what someone is willing to pay for it at a  
12 given point in time?  
13 A. In general, that's what we call a  
14 fair market value.  
15 Q. Yes, sir.  
16 A willing buyer, a willing  
17 seller, right?  
18 A. Yes, sir.  
19 Q. You understand that the Asset  
20 Purchase Agreement and the ensuing sale  
21 transaction was the result of a competitive  
22 bidding process?  
23 A. Yes, sir.  
24 Q. And there was one bidder?  
25 A. In the end there was one bidder

Page 115

1  
2 for the totality.  
3 Q. Yes.  
4 A. Yes.  
5 Q. For substantially all of the  
6 assets, right?  
7 A. Yes.  
8 Q. Are you aware that at all times  
9 the ESL favored a going-concern sale in  
10 this case?  
11 A. ESL very much wanted to see a  
12 going-concern sale.  
13 Q. And ESL very much did not want a  
14 liquidation, correct?  
15 A. ESL tried very hard not to have a  
16 liquidation, yes. Of the entirety.  
17 Q. Yes.  
18 I want to turn to 506(C)  
19 surcharges.  
20 Your client, as you said, was  
21 Cleary, and Cleary represents ESL, correct?  
22 A. Correct.  
23 Q. Section 6 of your report refers  
24 to 506(C) surcharges on behalf of the  
25 second lien creditors, correct?

Page 116

1  
2 MR. MOLONEY: On behalf of them?  
3 Q. In connection with the second  
4 lien creditors. Excuse me.  
5 MR. GENENDER: Thank you, Tom.  
6 A. It raises the question of the  
7 benefit for whom the expenses were  
8 incurred.  
9 Q. And you don't draw a distinction  
10 between ESL and, for example, Cyrus, do  
11 you?  
12 A. Second lien creditors.  
13 Q. Yes. You don't draw a  
14 distinction by and between any of them,  
15 correct?  
16 A. Correct.  
17 Q. It's your opinion that the  
18 expenses incurred to preserve a  
19 Going-Concern transaction were not for the  
20 primary benefit of the second lien  
21 creditors; is that your view?  
22 A. Not all.  
23 Q. Well, how much were for the  
24 benefit of the second lien creditors?  
25 A. Well, what we fall back -- it's

Page 117

1  
2 obviously a very tough thing to answer with  
3 specificity.  
4 We use the concept of four-wall  
5 profitability, and basically treat as not  
6 related to the primary benefit of the  
7 collateral the central expenses.  
8 You understand the distinction  
9 between four-wall and central expense?  
10 Q. (Nodding affirmatively.)  
11 Okay. So your chart on page 20  
12 of your report is designed to reflect  
13 increased recovery from going-concern sale;  
14 is that right?  
15 A. Well, this section reports on  
16 what people have said about that.  
17 Q. Okay. But your chart says,  
18 "Increased recovery from going-concern  
19 sale."  
20 That is the heading, right?  
21 A. Yes. It's summarizing  
22 declarations of Meghji and Alan Carr.  
23 Q. Were you aware that ESL owns a  
24 substantial portion of the Dove loan that's  
25 referenced in this chart?

Page 118

1  
2 MR. MOLONEY: The what loan?  
3 MR. GENENDER: Dove loan.  
4 BY MR. GENENDER:  
5 Q. Loans, I should say.  
6 A. I didn't know that. I don't  
7 think I care.  
8 Q. Were you aware that ESL owns a  
9 substantial portion of the Ground Lease &  
10 IP Loans?  
11 A. No, and I did not take that into  
12 account, and I don't think I care.  
13 Q. You included: "Protection  
14 Agreement, SYW & Gift Cards."  
15 Do you see that?  
16 A. Yes.  
17 Q. Those are contingent liabilities,  
18 aren't they?  
19 A. It's a loyalty program and it's  
20 money owed to customers. So I suppose it  
21 is... I don't know how much of it has been  
22 asserted and how much of it is contingent.  
23 I don't know the answer to that.  
24 Q. Fair enough.  
25 Could you imagine a scenario in

Page 119

1  
2 which ESL or Transform purchased Sears  
3 without also agreeing to honor the  
4 protection agreement in gift cards?  
5 A. Well, we did it in Toys-R-Us.  
6 Q. It was liquidation, though,  
7 wasn't it?  
8 A. Yes. Well, not in Britain, not  
9 in Asia, not in Europe.  
10 Q. Okay. Would you think it  
11 reasonable or conceivable for ESL to  
12 purchase Sears as it did without also  
13 agreeing to honor the protection agreement  
14 and gift cards?  
15 A. I would expect it would be a  
16 routine business practice to want to  
17 protect money owed to customers.  
18 Q. Okay. The cure costs --  
19 A. I don't know exactly how that was  
20 handled here.  
21 Q. Fair enough.  
22 The cure costs referenced in this  
23 chart benefit junior stakeholders by  
24 increasing the recovery pool as compared to  
25 a liquidation scenario; is that right?

Page 120

1  
2 A. I don't know what the cure costs  
3 are.  
4 Q. Okay. Do you know what they're  
5 made up of?  
6 A. No.  
7 Q. You'd agree as a general  
8 proposition that a retailer's relationships  
9 with its vendors are important?  
10 A. Sure.  
11 Q. You'd agree as a general  
12 proposition that a retailer's relationship  
13 with its landlords are important? If it  
14 has -- if it actual stores?  
15 A. Less significant if -- than to  
16 the vendors if they plan to stay in  
17 business.  
18 Q. Okay. Are you aware that the  
19 \$35 million reference on your chart on page  
20 20 is the credit bid consideration?  
21 A. Is that -- I'm not sure quite  
22 what that is. Is that the money that ESL  
23 agreed to pay in exchange for there being  
24 no subordination challenge?  
25 MR. MOLONEY: Agreed to be

Page 121

1  
2 allowed to bid.  
3 THE WITNESS: To be allowed to  
4 bid. Okay.  
5 BY MR. GENENDER:  
6 Q. Because it was such an effective  
7 answer that your counsel gave you, I'm not  
8 going to object, because that was helpful.  
9 In other words, you understand  
10 that this payment was made to allow ESL and  
11 the other second lienholders to credit bid  
12 approximately \$433 million in second lien  
13 debt.  
14 Is that your understanding?  
15 A. Yes. That's my answer.  
16 Q. Thank you.  
17 MR. GENENDER: One second.  
18 (Counsel conferring.)  
19 BY MR. GENENDER:  
20 Q. Have you calculated, Mr. Schulte,  
21 the -- strike that.  
22 Have you done any analysis of the  
23 costs incurred by the debtors between the  
24 date of the APA, January 17th, 2018, and  
25 the date the sale closed, February 11th,

Page 122

1  
2 2018, to preserve the ability of that  
3 transaction to close?  
4 A. I don't think so.  
5 Q. Okay. Have you done any analysis  
6 of the costs incurred by the debtors  
7 between December 28th, 2018, which is the  
8 date ESL first submitted a bid, and  
9 February 11th, the date the transaction  
10 closed, to preserve the second lien --  
11 A. No.  
12 Q. -- claims?  
13 A. No.  
14 Q. Collateral, I should say. You  
15 did not.  
16 And you're not aware of your team  
17 doing that, are you?  
18 A. I am not.  
19 Q. You haven't been asked to do  
20 that, have you?  
21 A. Correct.  
22 Q. Do you know if there are ordinary  
23 course provisions in the Asset Purchase  
24 Agreement?  
25 A. I don't know exactly what you're


Page 123

1  
2 asking.  
3 Q. Have you -- do you have any  
4 familiarity with the ordinary course  
5 provisions in the Asset Purchase Agreement?  
6 A. No, not particularly. I'm  
7 familiar with the concept of ordinary  
8 course of business.  
9 Q. Are you aware that as a condition  
10 precedent to the APA, the debtor was  
11 required to deliver -- the debtors were  
12 required to deliver the threshold aggregate  
13 amount of inventory credit card receivables  
14 and pharmacy receivables?  
15 A. Yes, we talked about that.  
16 Q. The "at least"?  
17 A. Yes, the "at least."  
18 MR. GENENDER: Let's take a short  
19 break.  
20 MR. MOLONEY: Okay.  
21 (Recess is taken.)  
22 MR. GENENDER: We will pass the  
23 witness and reserve questions if  
24 something new develops, but otherwise  
25 we'll pass the witness.

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1  
2 MR. MOLONEY: Fine.  
3 MR. FOX: No questions.  
4 MR. LIUBICIC: No questions.  
5 MR. MOLONEY: We're done.  
6 MR. SORKIN: We don't have  
7 questions. We reserve right to ask  
8 questions.  
9  
10  
11  
12  
13 \_\_\_\_\_  
14 DAVID M. SCHULTE  
15  
16 Subscribed and sworn to before me  
17 this day of 2019.  
18  
19 \_\_\_\_\_  
20  
21  
22  
23  
24  
25

Page 125

1  
2 C E R T I F I C A T E  
3  
4 STATE OF NEW YORK )  
5 : ss.  
6 COUNTY OF WESTCHESTER )  
7  
8 I, ANNETTE ARLEQUIN, a Notary  
9 Public within and for the State of New  
10 York, do hereby certify:  
11 That DAVID M. SCHULTE, whose  
12 deposition is hereinbefore set forth,  
13 was duly sworn by me, and that the  
14 transcript of such depositions is a  
15 true record of the testimony given by  
16 such witness.  
17 I further certify that I am not  
18 related to any of the parties to this  
19 action by blood or marriage; and that I  
20 am in no way interested in the outcome  
21 of this matter.  
22 IN WITNESS WHEREOF, I have hereunto  
23 set my h  y of June, 2019.  
24  
25 ANNETTE ARLEQUIN, CCR, RPR, CRR, RSA

Page 127

1  
2 I N D E X O F E X H I B I T S (Cont'd.)  
3 DESCRIPTION PAGE  
4 Schulte Exhibit 7, GOB Inventory 92  
5 Recovery Rates, Bates-stamped  
6 ESL\_507B00000002 through 3  
7  
8 Schulte Exhibit 8, Asset Purchase 105  
9 Agreement dated as of 1/17/19 by  
10 and among Transform Holdco LLC,  
11 Sears Holdings Corporation and  
12 its subsidiaries party hereto,  
13 not Bates-stamped  
14  
15  
16  
17  
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19  
20  
21  
22  
23  
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25

Page 126

1  
2 I N D E X  
3  
4 WITNESS PAGE  
5  
6 DAVID M. SCHULTE  
7 MR. GENENDER 6  
8  
9 I N D E X O F E X H I B I T S  
10 DESCRIPTION PAGE  
11 Schulte Exhibit 1, Expert Report 12  
12 of David M. Schulte  
13  
14 Schulte Exhibit 2, Excel of 51  
15 General Ledger  
16  
17 Schulte Exhibit 3, Sears Holding 59  
18 Corp document entitled Exhibit A,  
19 35 pages, not Bates-stamped  
20  
21 Schulte Exhibit 4, Valuation, not 66  
22 Bates-stamped  
23  
24 Schulte Exhibit 5, Tiger Report 68  
25 dated 9/28/18 on Sears Holdings  
Corporation, Bates-stamped  
SEARS\_507B\_00001287 through 1344  
26  
27 Schulte Exhibit 6, Index to 75  
28 Appendix B of Expert Report of  
29 David Schulte, not Bates-stamped  
30

Page 128

1  
2 ERRATA SHEET FOR THE TRANSCRIPT OF:  
3 CASE NAME: SEARS HOLDINGS CORPORATION  
4 DATE: SATURDAY, JUNE 29, 2019  
5 DEPONENT: DAVID M. SCHULTE  
6 Pg. Ln. Now Reads Should Read Reason  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19 DAVID M. SCHULTE  
20 SUBSCRIBED AND SWORN BEFORE ME  
21 THIS \_\_\_\_ DAY OF \_\_\_\_ 2019.  
22  
23  
24 (Notary Public)  
25 MY COMMISSION EXPIRES: \_\_\_\_\_



# **Exhibit 98**

**In The Matter Of:**  
*In Re:*  
*Sears Holdings Corporation*

---

*William H. Henrich*  
*July 2, 2019*  
*High Confidential*

---



Page 1

1  
2 UNITED STATES BANKRUPTCY COURT  
3 FOR THE DISTRICT OF NEW YORK  
4  
5  
6 In Re:  
7 SEARS HOLDINGS CORPORATION, et al.,  
8 Debtors.  
9 \_\_\_\_\_/  
10 \* H I G H L Y C O N F I D E N T I A L \*  
11 DEPOSITION OF WILLIAM H. HENRICH  
12 New York, New York  
13 Tuesday, July 2, 2019  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23 Reported by:  
24 ANNETTE ARLEQUIN, CCR, RPR, CRR, CLR  
25 JOB NO. 2019-73118

Page 2

1  
2  
3  
4  
5 June 29, 2019  
6 12:09 p.m.  
7  
8 HIGHLY CONFIDENTIAL deposition of  
9 WILLIAM H. HENRICH, held at the offices  
10 of WEIL GOTSHAL & MANGES, LLP, 767  
11 Fifth Avenue, New York, New York,  
12 pursuant to Notice, before Annette  
13 Arlequin, a Certified Court Reporter, a  
14 Registered Professional Reporter, a  
15 Certified Realtime Reporter, and a  
16 Realtime Systems Administrator and a  
17 Notary Public of the State of New York  
18 and New Jersey.  
19  
20  
21  
22  
23  
24  
25

Page 3

1  
2 A P P E A R A N C E S:  
3  
4 AKIN GUMP STRAUSS HAUER & FELD, LLP  
5 Counsel for Unsecured Creditors  
6 One Bryant Park  
7 Bank of America Tower  
8 New York, New York 10036  
9 BY: PATRICK J. GLACKIN, ESQ.  
10 Pglackin@akingump.com  
11  
12 WEIL GOTSHAL & MANGES, LLP  
13 Counsel for Debtors and  
14 Debtors-in-Possession: Sears Holdings  
15 Corporation, et al.,:  
16 200 Crescent Court - Suite 300  
17 Dallas, Texas 75201-6950  
18 BY: PAUL GENENDER, ESQ.  
19 Paul.genender@weil.com  
20 BY: JAKE RUTHERFORD, ESQ.  
21 Jake.rutherford@weil.com  
22  
23  
24  
25

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1  
2 A P P E A R A N C E S(Cont'd.):  
3  
4 CLEARY GOTTlieb STEEN & HAMILTON, LLP  
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6 One Liberty Plaza  
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15 BY: ROBERT J. LIUBICIC, ESQ.  
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25

Page 5

1  
2 A P P E A R A N C E S(Cont'd.):  
3  
4 SEYFARTH SHAW  
5 Counsel for Wilmington Trust, National  
6 Association, as Indenture Trustee and  
7 Collateral Agent  
8 New York Times Building  
9 620 Eighth Avenue  
10 New York, New York 10018-1405  
11 BY: EDWARD M. FOX. ESQ.  
12 Emfox@seyfarth.com  
13 BY: STEVEN PARADISE, ESQ.  
14 Sparadise@seyfarth.com  
15  
16 ALSO PRESENT:  
17  
18 Luke Andrews, Getzler Henrich & Associates  
19 Daniel Polsky, Getzler Henrich & Associates  
20 Nicholas Weber, M-III Partners  
21 Gihyun Kim, Seyfarth Shaw, Summer Associate  
22  
23  
24 - ooo -  
25

Page 6

1  
2 WILLIAM H. HENRICH, called  
3 as a witness, having been duly sworn  
4 by a Notary Public, was examined and  
5 testified as follows:  
6 THE WITNESS: I do.  
7 EXAMINATION BY  
8 MR. GENENDER:  
9 Q. Could you state your name for the  
10 record.  
11 A. Sure. William Howard Henrich.  
12 Q. And Mr. Henrich, how are you  
13 employed?  
14 A. I am co-chairman of Getzler  
15 Henrich & Associates.  
16 Q. And how long have you been  
17 associated with that firm?  
18 A. 16 years.  
19 Q. And walk me through your work  
20 background prior to that, since you  
21 finished your schooling.  
22 A. Sure. 1977 graduated Baruch  
23 College, undergrad.  
24 I joined Arthur Andersen in a  
25 more traditional capacity, accounting

Page 7

1  
2 auditing capacity, for three years.  
3 Left to attend Harvard Business  
4 School, earned my MBA at HBS.  
5 Upon graduating, rejoined Arthur  
6 Andersen to start their bankruptcy and  
7 restructuring practice in New York and I  
8 was part of the firm-wide core group of  
9 partners that ran it nationally. I was  
10 there for a period of time. Left to join  
11 Arrow Electronics for seven years in  
12 various senior management capacities;  
13 finance operations, sales marketing.  
14 Was solicited to come back to  
15 Arthur Andersen to bolster the group that I  
16 originally started; did so in 1990 or '91.  
17 I forget exactly which year.  
18 And in late, mid-late 1996, left  
19 Andersen to start the New York office of  
20 Executive Sounding Board Associates, which  
21 was a Philadelphia-based middle market  
22 turnaround firm. I was there for seven  
23 years, grew that firm substantially, and in  
24 early 2003, joined what was Getzler &  
25 Company upon my joining became Getzler

Page 8

1  
2 Henrich & Associates.  
3 Q. Great.  
4 You mentioned that you have a  
5 business degree from Harvard, right?  
6 A. Yes.  
7 Q. Masters in business  
8 administration from Harvard?  
9 A. Correct.  
10 Q. You do not have any legal  
11 training; is that right?  
12 A. That is correct.  
13 Q. Do you feel as if you want to  
14 remind the younger people in the room what  
15 Arthur Andersen is?  
16 (Laughter.)  
17 A. Would you like me to?  
18 Q. Because I'm old enough to know.  
19 Fair enough.  
20 A. May it rest in piece.  
21 Q. Yes, exactly.  
22 Have you given depositions  
23 before?  
24 A. I have.  
25 Q. On a number of occasions?

Page 9

1  
2 A. Yes.  
3 Q. Let me go through a few brief  
4 ground rules to allow this to go as  
5 smoothly as possible, all right.  
6 As you know, you are under oath,  
7 correct?  
8 A. Yes.  
9 Q. You know everything is being  
10 taken down?  
11 A. Yes.  
12 Q. So we need audible answers.  
13 A. Yes.  
14 Q. If you don't hear a question that  
15 I ask you, will you let me know?  
16 A. I will.  
17 Q. If you don't understand a  
18 question that I ask you, will you let me  
19 know?  
20 A. Most definitely.  
21 Q. If you don't let me know, am I  
22 safe to assume that you both heard and  
23 understood my question?  
24 A. I understand.  
25 Q. Okay. Is there anything

Page 10

1  
2 preventing you from giving truthful and  
3 accurate testimony here today?  
4 A. Nothing.  
5 Q. What did you do to prepare for  
6 your deposition today, generally speaking?  
7 A. Generally speaking, I reviewed  
8 our report. I reviewed the source material  
9 and did meet with counsel.  
10 Q. Counsel being Mr. Fox?  
11 A. Mr. Fox and Mr. Paradise.  
12 Q. Okay. And have any of your  
13 opinions in your report that was issued on  
14 June 18th, have any of them changed?  
15 A. No.  
16 Q. Do you have any new opinions that  
17 are not contained in the report?  
18 MR. FOX: You mean about the  
19 case?  
20 MR. GENENDER: Yes. Yes.  
21 A. There are no new opinions that  
22 changed the conclusions in the report.  
23 Q. Okay. Does the report still  
24 contain all the opinions you intend to  
25 offer in this proceeding?

Page 11

1  
2 A. Essentially, yes. I mean we may  
3 have been informed on certain items as a  
4 result of the other declarations or the  
5 other expert reports that were submitted,  
6 and there may still be certain information  
7 subject to verification that could cause us  
8 to amend certain elements of our report but  
9 not the overall conclusion.  
10 Q. Okay. So you used the word  
11 "could cause us to amend certain elements  
12 of our report."  
13 I want to move from "could" to  
14 "have."  
15 As we sit here today, have any of  
16 the opinions in your June 18th report  
17 changed?  
18 A. The opinions have not changed.  
19 Q. Have any of the conclusions you  
20 reached changed?  
21 A. The conclusions have not changed.  
22 Q. I'm going to hand you what I've  
23 marked as Exhibit 1.  
24 (Henrich Exhibit 1, Exhibit J  
25 containing the Expert Report of William

Page 12

1  
2 Henrich in Connection with Assessment  
3 of 507(b) Adequate Protection Claims  
4 Asserted by Wilmington Trust, National  
5 Association, marked for identification,  
6 as of this date.)  
7 BY MR. GENENDER:  
8 Q. This says Exhibit J on it because  
9 that is how it was attached to the  
10 Wilmington Trust filing.  
11 Can you identify Exhibit 1 as a  
12 true and correct copy of your expert report  
13 dated June 18th, 2019?  
14 MR. FOX: Let me just interrupt.  
15 This is the unsigned that was attached,  
16 but I think we circulated a signed copy  
17 after that.  
18 MR. GENENDER: Is there anything  
19 different on it? I note it unsigned.  
20 MR. FOX: I think we have that  
21 here.  
22 MR. GENENDER: I don't remember  
23 seeing it, but that's fine. It may  
24 have been.  
25 MR. FOX: Or you can sign this

Page 13

1  
2 one.  
3 BY MR. GENENDER:  
4 Q. Is this a true and correct copy  
5 of your report?  
6 A. Yes, it is.  
7 Q. And you're welcome to sign it. I  
8 have no issue --  
9 MR. PARADISE: We can send them  
10 over to sign if we haven't done that  
11 already.  
12 MR. GENENDER: Okay.  
13 BY MR. GENENDER:  
14 Q. Is this the same -- is this your  
15 final report?  
16 A. Yes, it is.  
17 Q. Thank you.  
18 Throughout your deposition when I  
19 refer to your report, you're going to know  
20 I'm referring to Exhibit 1?  
21 A. Yes.  
22 Q. Is there any aspect of Exhibit 1  
23 aside from it missing your signature that  
24 you would like to change as you sit here  
25 today?

Page 14

1  
2 A. As aforementioned, there are no  
3 opinions or conclusions that I wish to  
4 change.  
5 Q. Okay. Is there anything that you  
6 currently have an intention of adding to  
7 Exhibit 1 to your report?  
8 A. As of today, there is nothing  
9 that I am considering adding. However, as  
10 I mentioned previously, there may be a  
11 couple of line items that we have  
12 incorporated that we were further informed  
13 by the expert reports or we may seek  
14 further information that could change our  
15 inclusion or exclusion of certain elements  
16 in the calculation.  
17 Q. Have you arrived at any decision  
18 as to whether the other expert reports  
19 inform or change your opinions, as you sit  
20 here today?  
21 A. It doesn't change the opinion,  
22 no.  
23 Q. Does it change any aspect of your  
24 report?  
25 A. It could enhance the cushion that

Page 15

1  
2 we concluded upon.  
3 Q. Okay. Does it?  
4 A. Well, there are two elements that  
5 are -- that we are considering. One, is we  
6 were unaware whether or not the first lien  
7 LCs were drawn or undrawn. The other  
8 expert reports indicate that they were  
9 undrawn, in which case we would eliminate  
10 that from the debt stack that we had  
11 utilized in our calculation.  
12 Additionally, both -- all the  
13 declarations or the declaration of Brian  
14 Griffith as well as the expert reports of  
15 Schulte and Marti Murray included the Sears  
16 Home Services inventory in its calculation  
17 of inventory. We were uncertain and took a  
18 conservative approach at the time whether  
19 or not that was collateral issued by the  
20 grantors, and therefore we did not include  
21 it at the time.  
22 Q. Do you know if it should be  
23 included?  
24 A. At this juncture, we're uncertain  
25 and that's why I said we could be further

Page 16

1  
2 informed. You know, through this process  
3 that might add those line items or adjust  
4 those line items in the calculation.  
5 Q. Have you read the testimony of  
6 David Schulte given three days ago?  
7 A. Yes.  
8 MR. FOX: Have you read it?  
9 THE WITNESS: I'm sorry, excuse  
10 me.  
11 A. The testimony?  
12 Q. Yes.  
13 A. I apologize. No, I have not read  
14 the testimony.  
15 Q. You understand he gave a  
16 deposition three days ago?  
17 A. I do understand that.  
18 Q. You have not read the transcript?  
19 A. I have not read the transcript.  
20 Q. Have you received any sort of  
21 report of what his testimony was? This is  
22 a yes or no at this point.  
23 A. A report as to his testimony?  
24 Q. An update or summary?  
25 A. No.



Page 17

1  
2 Q. Do you have any understanding as  
3 to what he testified in his deposition  
4 three days ago?  
5 A. No.  
6 Q. Have you spoken to him about this  
7 case?  
8 A. Never.  
9 Q. Have you spoken to Marti Murray  
10 about this case?  
11 A. Never.  
12 Q. Had you seen either of their  
13 reports prior to their being issued in this  
14 case?  
15 A. No.  
16 Q. Were you aware of what their  
17 opinions might be or were prior to issuing  
18 your opinions in this case?  
19 A. Absolutely not.  
20 Q. Your report indicates that you've  
21 testified previously as a witness in  
22 numerous bankruptcy matters more than 20  
23 times; is that fair?  
24 A. That's fair.  
25 Q. How many times have you given

Page 18

1  
2 live testimony in court, if you recall?  
3 A. Well, I don't know the exact  
4 number, but the 20 was an approximation of  
5 giving live testimony.  
6 Q. Thank you.  
7 If you'll turn to Appendix A to  
8 your report. Yeah, Appendix A to your  
9 report.  
10 (Witness complies.)  
11 Q. That lists the documents  
12 considered in connection with your report;  
13 is that right?  
14 A. Yes.  
15 Q. Is that still accurate?  
16 A. Yes.  
17 Q. How much time have you spent in  
18 connection with this engagement?  
19 A. I've spent a considerable amount  
20 of time. I don't know the exact amount.  
21 Q. When did you start your work?  
22 A. We were engaged in early April.  
23 I believe the engagement letter is dated  
24 approximately April 9th or thereabouts.  
25 Q. What were you engaged to do?

Page 19

1  
2 A. To evaluate a 507(b) claim of the  
3 second lien noteholders.  
4 Q. Of all the second lien  
5 noteholders?  
6 A. Well, we were hired by counsel to  
7 Wilmington Trust as indentured trustee to  
8 the junior secured -- the junior  
9 second-lien noteholders.  
10 Q. And when did you start your work?  
11 A. Shortly thereafter.  
12 Q. When did you complete your work?  
13 In effect, when did you reach the  
14 conclusions that are reflected in  
15 Exhibit 1?  
16 A. About two minutes to midnight on  
17 June 18th.  
18 Q. Eastern time, to be specific.  
19 (Laughter.)  
20 A. That would be accurate.  
21 Q. Who else worked with you on this  
22 engagement?  
23 A. There were three individuals, two  
24 who are with me today. Dan Polsky, Luke  
25 Andrews, and Ed Phillips.

Page 20

1  
2 Q. And do you have an approximation  
3 about how much time you have spent on this  
4 engagement?  
5 A. I have not looked at a summary.  
6 Q. What was your role on your team  
7 as compared to your other team members?  
8 A. I was responsible for managing  
9 the team and I was intimately involved in  
10 the deliberation and assumption of  
11 methodology. I've also read through the  
12 source material as well.  
13 Q. Have you reviewed all the  
14 materials on Appendix A to your report?  
15 A. I have.  
16 Q. Is Appendix A a complete list of  
17 documents considered by you in preparing  
18 Exhibit 1?  
19 A. Yes.  
20 Q. Are you relying on any other  
21 documents in providing your opinions in  
22 this case other than those listed on  
23 Appendix A to your report?  
24 A. These were the documents that  
25 were considered in the preparation of the

Page 21

1  
2 report that led to the conclusions outlined  
3 therein.  
4 Q. Have you spoken with any  
5 employees or representatives of Wilmington  
6 Trust in connection with your work in this  
7 matter?  
8 A. Never.  
9 Q. Have you spoken with any  
10 financial advisors for Wilmington Trust in  
11 connection with your work in this matter?  
12 A. No.  
13 Q. Have you spoken with any  
14 representatives of the other second  
15 lienholders in connection with your work in  
16 this matter?  
17 A. No.  
18 Q. You hold a CPA license?  
19 A. I do.  
20 Q. And how long have you held that  
21 license?  
22 A. Since 1979.  
23 Q. Who contacted you about this  
24 engagement?  
25 A. Mr. Fox of Seyfarth Shaw.

Page 22

1  
2 Q. Have you worked with Mr. Fox  
3 before?  
4 A. I don't believe that we've ever  
5 worked together before in a matter.  
6 Q. Do you have an understanding as  
7 to how he came to reach out to you?  
8 A. I actually learned that yesterday  
9 when I asked.  
10 Q. And?  
11 A. And he thought I was a good  
12 candidate and I would be, given my  
13 experience, so he opted to pick up the  
14 phone and call me.  
15 Q. Have you worked with his firm  
16 before?  
17 A. I personally have not, but  
18 some -- or select colleagues in my firm may  
19 have, albeit, I don't believe necessarily  
20 with the New York office of Seyfarth.  
21 Q. Have you viewed Wilmington  
22 Trust's brief filed shortly before midnight  
23 on June 18th in this case in connection  
24 with this proceeding?  
25 A. Is that the supplemental

Page 23

1  
2 memorandum?  
3 Q. Yes, sir. The legal filing that  
4 your report was an exhibit to.  
5 A. Right. I read that after the  
6 report was issued.  
7 Q. Okay. So you had no role in  
8 preparing it?  
9 MR. FOX: Preparing what?  
10 MR. GENENDER: The briefing.  
11 A. The legal briefing?  
12 Q. Yes, sir.  
13 A. No.  
14 Q. And you had not reviewed it until  
15 after you had already submitted your  
16 report?  
17 A. I believe that to be correct.  
18 Q. Did you sign your report before  
19 midnight on June 18th?  
20 A. Yes.  
21 Q. Okay. And the signed version  
22 didn't get filed?  
23 A. The signature page -- we prepared  
24 and provided the report. It was then  
25 indicated to us that it needed to be

Page 24

1  
2 signed. We sent Seyfarth a separate signed  
3 signature page. What happened after that,  
4 I can't tell you. I can't share.  
5 Q. We might just call that a  
6 disconnect of sorts and it didn't get  
7 attached to what was filed; is that fair?  
8 A. It may not have gotten -- that is  
9 fair.  
10 Q. When it was filed?  
11 A. But as indicated, we're happy to  
12 provide a signed copy or I'm happy to sign  
13 a copy here.  
14 Q. And your testimony is that  
15 Exhibit 1 in front of you is the same  
16 version that you have signed, and you have  
17 a pen there and you would sign it if one of  
18 your lawyers would let you?  
19 A. That is correct.  
20 Q. Great.  
21 I think we have a split of  
22 authority between your two lawyers here.  
23 One seems inclined to let you sign it and  
24 one doesn't. That is okay. You should  
25 have brought an odd number of lawyers with

Page 25

1  
2 you to break the tie.  
3 A. I will let them fight it out.  
4 Q. Yes. Yes.  
5 Who drafted the text of your  
6 report?  
7 A. That was -- that was a combined  
8 effort.  
9 Q. Okay. Do you own the words in  
10 the report? You signed it, so you're  
11 accountable.  
12 A. I'm responsible for those --  
13 Q. Yes, yes. In terms of actually  
14 drafting the eight pages of text, that was  
15 a combined effort by you and your team?  
16 A. Yes.  
17 Q. How many drafts of the report  
18 were there?  
19 A. I sincerely don't recall.  
20 Q. When was the first draft  
21 prepared, if you know?  
22 A. I don't recollect when.  
23 Q. Was it a week before the  
24 deadline, two weeks before the deadline?  
25 A. There was an early draft. There

Page 26

1  
2 was an early draft a week or two before,  
3 but that was also prior to receipt of the  
4 document production. There certainly were  
5 modifications to that draft.  
6 Q. Your bio, which is attached as  
7 Exhibit 1 to your report, I'm assuming that  
8 is a true and correct copy of your, in  
9 effect, your CV?  
10 A. Yes. And a much younger picture.  
11 Q. I'll take your word for it.  
12 If I look at page 1, the first  
13 page -- they're not numbered, which I'll  
14 note. The first page of text, it says,  
15 "Qualifications."  
16 A. Yes.  
17 Q. You talked about you've been  
18 involved in more than 400 engagements  
19 during your career and have great  
20 familiarity with the issues involved in  
21 this matter.  
22 Do you see that?  
23 A. Yes.  
24 Q. How do you have great familiarity  
25 with the issues involved in this matter?

Page 27

1  
2 Is that based on the work you've done since  
3 April 9th?  
4 A. I have been involved in  
5 bankruptcy matters throughout my career.  
6 Q. Okay. But I'm just looking at  
7 your statement: "I have great familiarity  
8 with the issues involved in this matter."  
9 What does that mean?  
10 A. That means I understand the  
11 premise of a 507(b) claim.  
12 Q. Okay. How many of your 400  
13 engagements involved liquidations?  
14 A. I don't know any exact count. It  
15 is -- presumably it would be a smaller  
16 number of the 400 engagements though.  
17 Q. Can you identify any of your  
18 prior engagements that involved  
19 liquidations?  
20 A. As I sit here today?  
21 Q. Yes.  
22 A. You tend to forget the  
23 liquidations.  
24 (Laughter.)  
25 A. Well, one always stood out for

Page 28

1  
2 different reasons, Hayes Modem, many years  
3 ago. Trying to think of more recently.  
4 Q. Any others come to mind?  
5 A. At this particular moment, no,  
6 I'd have to think about it.  
7 Q. How many -- of your prior  
8 engagements, on how many of them have you  
9 offered an expert opinion on issues  
10 relating to 507(b)?  
11 A. I have not issued expert opinions  
12 on 507(b) previously.  
13 Q. In your prior engagements, on how  
14 many occasions have you issued expert  
15 opinions on issues related to 506(c)?  
16 A. I have testified in a 506(c)  
17 matter.  
18 Q. In which matter?  
19 A. Flat Out Crazy.  
20 Q. Okay. And where was that  
21 pending?  
22 A. Southern District of New York.  
23 Q. When was that?  
24 A. I don't recall the exact date. I  
25 would suggest it was approximately seven

Page 29

1  
2 years ago, plus or minus.  
3 Q. Who retained you?  
4 A. I was the CRO of the debtor.  
5 Q. Okay. Who was the debtors'  
6 counsel?  
7 A. Stephen Lerner of Squire Sanders.  
8 Q. Which court was it in?  
9 A. Judge Drain.  
10 Q. And you provided testimony on  
11 behalf of the debtor?  
12 A. Yes.  
13 Q. Did you provide testimony that  
14 there was an applicable 506(c) surcharge?  
15 A. Yes.  
16 Q. And what was the result of that  
17 proceeding?  
18 A. That there was a 506(c)  
19 surcharge.  
20 Q. Do you know how much the court  
21 determined there to be a 506F surcharge?  
22 A. I have no recollection.  
23 Q. Did the court accept your number?  
24 A. Judge Drain, after the hearing,  
25 mediated a determination and I don't recall

Page 30

1  
2 whether it was a formal mediation or he  
3 opted to inject himself, as he often can  
4 and show a little diplomacy.  
5 Q. Was that in the context of a  
6 confirmation proceeding?  
7 A. It was not part of a confirmation  
8 hearing proceeding. It was the secured  
9 lender essentially wanted the process for  
10 free and they were the successful bidder at  
11 auction. And so there was a hearing.  
12 Q. Did you issue a written report?  
13 A. No.  
14 Q. In connection with providing  
15 those opinions?  
16 A. No.  
17 Q. Okay. You gave testimony in open  
18 court?  
19 A. I gave testimony in open court.  
20 Q. And who were the lawyers for the  
21 secured lenders?  
22 A. I don't recall the name of the  
23 attorney. It was a law firm out of  
24 Maryland, and not a well-recognized law  
25 firm.

Page 31

1  
2 Q. And were they taking the position  
3 that this should be a 506(c) surcharge of  
4 zero?  
5 A. I don't recall what their  
6 position was.  
7 Q. The party that was opposing the  
8 506(c) surcharge was the successful bidder  
9 at an auction?  
10 A. Yes.  
11 Q. You as CRO of the debtor in that  
12 case in Flat Out Crazy were taking the  
13 position that there should be surcharges  
14 according to Section 506(c) of the  
15 Bankruptcy Code to reflect, what, expenses  
16 incurred by the estate to preserve the  
17 collateral?  
18 A. Yes.  
19 Q. What sorts of expenses did you  
20 think were appropriate in that case that  
21 would support a 506(c) surcharge?  
22 A. Essentially, it was over  
23 professional fees.  
24 Q. Any other? Administrative  
25 expenses? So administrative expenses?

Page 32

1  
2 MR. FOX: Objection. Asked and  
3 answered.  
4 A. I appreciate the question.  
5 You're asking specifics from a case seven  
6 to nine years ago, and I don't recall.  
7 Q. You'd refer to whatever your  
8 testimony was in that case, right?  
9 A. I testified in the case, right.  
10 Q. Whatever your testimony was would  
11 be a better reflection --  
12 A. Yes.  
13 Q. -- of what your opinions were  
14 than what you can recall today?  
15 A. Yes.  
16 Q. Okay. Is that the only instance  
17 in which you've offered expert testimony on  
18 506(c) issues prior to this proceeding?  
19 A. Yes.  
20 Q. And in this proceeding, you  
21 believe that there are 506(c) surcharges,  
22 don't you?  
23 A. Yes.  
24 Q. Okay. And what's your basis for  
25 believing that?

Page 33

1  
2 A. Because we do believe that a  
3 certain allocation of professional fees  
4 are -- in the pendency of the bankruptcy  
5 case are applicable to providing primary  
6 and direct benefit for the preservation of  
7 the collateral for the secured lender.  
8 Q. And they're reasonable and  
9 necessary, right?  
10 A. And reasonable and necessary.  
11 Q. Are you aware that Mr. Schulte  
12 and Ms. Murray don't indicate -- their  
13 reports don't reflect 506(c) surcharges?  
14 A. I am aware of that.  
15 Q. Do you agree with that?  
16 MR. FOX: Objection to form.  
17 A. No.  
18 Q. You have a different view?  
19 A. I have a different view.  
20 Q. The first and second pages of  
21 text of your report lists four enumerated  
22 opinions, correct?  
23 A. Correct.  
24 Q. And those are your opinions in  
25 this case, correct?

Page 34

1  
2 A. Correct.  
3 Q. And as we talked about probably  
4 more than you enjoyed, you don't have  
5 current plans to offer any other or  
6 different opinions than those four,  
7 correct?  
8 A. That is correct.  
9 Q. Thank you.  
10 Have you prepared any exhibits or  
11 demonstratives that would in any way depict  
12 or reflect your opinions other than what's  
13 attached to your report?  
14 A. No.  
15 Q. If you'll turn to the third page  
16 of text of your report, and under the  
17 second bullet it says, "The GOB stores  
18 achieved a recovery of 96.4 percent of  
19 inventory at cost net of all store  
20 expenses."  
21 Do you see that?  
22 A. I do.  
23 Q. And that information comes from  
24 the GOB recovery rates post Chapter 11  
25 produced by the debtors and provided to you

Page 35

1  
2 by counsel, correct?  
3 A. Correct.  
4 Q. Okay. And that information is  
5 also, I believe, Exhibit 5 to your report;  
6 is that correct?  
7 A. That is correct.  
8 Q. Do you know who generated  
9 Exhibit 5 to your report?  
10 A. I don't know with certainty.  
11 Q. Did you or your firm generate  
12 Exhibit 5?  
13 A. No.  
14 Q. That you do know with certainty?  
15 A. That I know with certainty.  
16 Q. Fair enough.  
17 (Henrich Exhibit 2, Document  
18 entitled "GOB Store Performance  
19 (Post-Ch. 11 Bankruptcy Filing),  
20 Bates-stamped ESL\_507B\_00000001, marked  
21 for identification, as of this date.)  
22 BY MR. GENENDER:  
23 Q. I'm handing you what's been  
24 marked as Exhibit 2. It is Bates-labeled  
25 ESL507B000001. I may be missing a zero.

Page 36

1  
2 Do you see that?  
3 A. I do.  
4 Q. Will you agree, sir, that the  
5 first page of Exhibit 2 is identical to the  
6 first page of your Exhibit 5 to your  
7 report?  
8 (Document review.)  
9 A. It looks identical.  
10 Q. It is identical, isn't it?  
11 A. Yes.  
12 Q. Okay. Now Exhibit 2 in the lower  
13 right-hand corner has yesterday's date on  
14 it.  
15 Do you see that, July 1, 2019?  
16 A. I do.  
17 Q. And that could reflect that it  
18 was printed yesterday.  
19 Would that be a fair assumption?  
20 A. That is my assumption.  
21 Q. I'll actually make that  
22 representation to you.  
23 A. Thank you.  
24 Q. Exhibit 5 to your report says  
25 June 18th, 2019, correct?



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1  
2 A. Correct.  
3 Q. That would reflect that it was  
4 printed on or before 11:58 Eastern time on  
5 the June 18, 2019, correct?  
6 A. Correct.  
7 Q. And that you do know, right?  
8 A. That I do know.  
9 Q. The line on your Exhibit 5 to  
10 your report, Exhibit 1 to this deposition,  
11 it says "GOB recovery rates, post Chapter  
12 11."  
13 Do you see that?  
14 A. I do.  
15 Q. Where did that text come from?  
16 A. I believe that was on there as  
17 received, but I can't say with certainty  
18 whether that's a file name that we provided  
19 or -- but I believe it was on the analysis  
20 as received.  
21 Q. Okay. But a difference between  
22 the first page -- between your Exhibit 5 to  
23 your report and first page of Exhibit 2 is  
24 the first page of Exhibit 2 has an ESL  
25 Bates number of Bates No. 1, correct?

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1  
2 A. Which is why I suggested it may  
3 be a file name that we provided it.  
4 Q. Understood.  
5 Looking at Exhibit 2, would that  
6 indicate to you that ESL created this  
7 document?  
8 A. I can't draw that conclusion.  
9 ESL might have provided it.  
10 Again, we made a request of the  
11 debtors for -- to produce certain  
12 documents, and we received this from  
13 counsel. So I can't suggest that ESL was  
14 the origin or the debtors were the origin.  
15 I would imagine that the debtor -- this is  
16 the debtors' information.  
17 So while ESL may or may not have  
18 prepared the schedule, the data would  
19 certainly come from the debtor.  
20 Q. Okay. So you got it from -- you  
21 got it from Mr. Fox and his firm, correct?  
22 A. Correct.  
23 Q. And do you have an understanding  
24 as to who has control of Sears's financial  
25 information as of February 11th, 2019?

Page 39

1  
2 A. That would be ESL.  
3 Q. Thank you.  
4 Looking at Exhibit 2, where it  
5 says, "Store format," the second column  
6 from the left, FLS is Sears, right?  
7 A. Yes.  
8 Q. And Kmart is Kmart, right?  
9 A. Correct.  
10 Q. And FLS plus Kmart are those two  
11 combined, correct?  
12 A. Correct.  
13 Q. The 96.4 percent net recovery  
14 rate that we referred to in your report,  
15 did that come from the lower-right or  
16 middle-right percentage in the first page  
17 of Exhibit 2, which is the same as the  
18 figure on Exhibit 5 to your report?  
19 A. Visualizing where you're  
20 pointing, it is the lower right-hand number  
21 on the page.  
22 Q. The 96.4 that we first read on  
23 the first page of text in your report  
24 regarding net recovery rate of inventory at  
25 cost net of all store expenses comes from

Page 40

1  
2 that figure, correct?  
3 A. Correct.  
4 Q. Thank you.  
5 MR. FOX: Just to clarify,  
6 referring to the far-right column, it  
7 says, "Net recovery percentage."  
8 MR. GENENDER: Yes.  
9 MR. FOX: And the bottom number  
10 in that column, correct?  
11 MR. GENENDER: Yes. Lower  
12 right of -- when I'm saying "lower  
13 right," I mean, actually the printed  
14 part of the page.  
15 MR. FOX: Of the first page of  
16 Exhibit 2.  
17 MR. GENENDER: First page of  
18 Exhibit 2 and the only page of  
19 Exhibit 5 to his report.  
20 BY MR. GENENDER:  
21 Q. Correct?  
22 A. Correct.  
23 Q. Thank you.  
24 What did you do to verify the  
25 accuracy of that figure?



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1  
2 A. We did not verify the accuracy of  
3 the number. We asked for the information.  
4 We received the information. We assumed it  
5 was accurate.  
6 Q. Okay. So if there are  
7 inaccuracies in this information, that  
8 could affect your conclusions, correct?  
9 MR. FOX: Objection. You can  
10 answer.  
11 A. It would not change our  
12 conclusion.  
13 Q. It would not? I need an answer.  
14 A. If there were inaccuracies in  
15 this table that changed certain numbers on  
16 this table that we utilized in our  
17 analysis, then it could change the  
18 analysis. There is a potential that it  
19 might change a conclusion, but I can't  
20 state that today.  
21 Q. Do you know who at ESL prepared  
22 Exhibit 2?  
23 A. No.  
24 Q. Who at Sears prepared Exhibit 2,  
25 I should say?

Page 42

1  
2 A. No.  
3 Q. Did you ask?  
4 A. No.  
5 Q. Do you know how the net recovery  
6 percent was calculated that's reflected on  
7 the right-hand column of the first page of  
8 Exhibit 2 or the bottom number that comes  
9 out to 96.4 percent under the totals?  
10 A. Yes.  
11 Q. How was that done?  
12 A. It is -- the numerator is the --  
13 the bottom number in the GOB sales column,  
14 774,641,623 divided by the sum of the cost  
15 of goods, which is the column entitled:  
16 Goods available at cost, 651,558,383, plus  
17 total GOB expenses, bottom number in that  
18 column 152,314,273.  
19 Q. So simple math, if I just used  
20 round rough numbers, 770 -- and if I just  
21 did this in millions, numerator of  
22 approximately 774 and a denominator of 803  
23 or 804?  
24 A. Correct.  
25 Q. Using rough math?

Page 43

1  
2 A. Correct.  
3 Q. That comes out to 96.4 percent?  
4 A. Correct.  
5 Q. The type of score my kids would  
6 like to get on any of their high school  
7 tests, right?  
8 These figures don't include  
9 corporate overhead, do they?  
10 A. They do not, to the best of our  
11 knowledge.  
12 Q. And they do not include  
13 bankruptcy expenses or administrative  
14 expenses, right?  
15 A. Correct.  
16 Q. Thank you.  
17 Now looking at Exhibit 2, the  
18 first page of Exhibit 2, which, again, I'm  
19 not going to keep saying this, is the same  
20 as Exhibit 5 to your report.  
21 The totals are set forth using  
22 three different announce dates of GOB  
23 stores, correct?  
24 A. Correct.  
25 Q. There is an announce date of

Page 44

1  
2 October 15, 2018, and an announce date of  
3 November 8th, 2018, and an announce date of  
4 December 27, 2018, correct?  
5 A. Correct.  
6 Q. And there is a combined 142 Sears  
7 and Kmart stores announced on October 15th,  
8 2018; is that right?  
9 A. Correct.  
10 Q. 40 more on November 8th, 2018,  
11 total.  
12 A. Correct.  
13 Q. And 80 more on December 27th,  
14 2018, correct?  
15 A. Correct.  
16 Q. And the totals, below the three  
17 enumerated announce dates, add up  
18 accordingly, right? Is it your  
19 understanding they would add up the numbers  
20 for Sears under each of those three dates,  
21 Kmart for each of those three dates, and  
22 the totals for each of those three dates,  
23 correct?  
24 A. Correct.  
25 Q. Now you're a CPA, which means you

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1  
2 have to be probably pretty decent at math;  
3 do you agree?  
4 MR. FOX: Objection.  
5 BY MR. GENENDER:  
6 Q. Let me start over.  
7 Are you decent at math?  
8 A. I believe so.  
9 Q. Do you see under the totals for  
10 149 Sears stores, it says 390,050,700?  
11 A. In the column "GOB sales"?  
12 Q. Yes, sir. Thank you.  
13 A. Yes.  
14 Q. Okay. And that is the column  
15 that comprises the numerator, correct?  
16 A. Correct.  
17 Q. That's made up of the FLS numbers  
18 from the top three sections for  
19 October 15th, November 8th, and  
20 December 27th, correct?  
21 A. Correct.  
22 Q. Can you take a minute and tell me  
23 if the Sears entries for the 77 GOB sales  
24 announced on October 15th, the 29 Sears  
25 GOBs announced on November 8th, and the 43

Page 46

1  
2 GOBs announced on December 27th add up to  
3 390 million?  
4 A. They add up to approximately 420.  
5 Q. Okay. All right. So the  
6 Exhibit 2 that you relied upon is incorrect  
7 at least in that respect; is that right?  
8 Exhibit 2 to your deposition, Exhibit 5 to  
9 your report is incorrect in that the 390  
10 number is incorrect, right?  
11 A. I can't draw that conclusion  
12 whether the total sales for the GOB for the  
13 Sears stores or even the Kmart or the  
14 combined is inaccurate or not. There may  
15 be other factors that were considered when  
16 they prepared the schedule that brought the  
17 gross numbers of the 420 down to the 390.  
18 So I have no basis to draw the  
19 conclusion that it's inaccurate.  
20 Q. Why don't you check the accuracy  
21 and using the same methodology to see if  
22 the Kmart total for the 113 Kmart GOB  
23 stores of \$384,590,923 is accurate?  
24 A. That would add up to  
25 approximately 311. But again, there may be

Page 47

1  
2 other factors that were considered in the  
3 preparation of the schedule.  
4 Q. Well, you don't know how  
5 Exhibit 2 was prepared, do you?  
6 A. No.  
7 Q. You didn't even attach all of  
8 Exhibit 2 to your report. You just  
9 attached the cover page, correct?  
10 A. Correct.  
11 Q. And the math that we just went  
12 through to determine the accuracy of the  
13 totals under GOB's sales, the first time  
14 you've done that check is right now,  
15 correct?  
16 A. The first time that I have added  
17 those three numbers to determine whether or  
18 not it equaled the total on the cover page,  
19 this is the first time that I've done that,  
20 yes.  
21 Q. Have you added up to see if the  
22 goods available at -- strike that.  
23 Those numbers, whatever they  
24 would be for GOB sales, that comprises the  
25 numerator in your fraction that creates the

Page 48

1  
2 96.4 percent, right?  
3 A. Would you repeat the question,  
4 please?  
5 Q. Under the fraction that you just  
6 said as to how the 96.4 percent net  
7 recovery percentages is calculated, the  
8 numerator is GOB sales, correct?  
9 A. Correct.  
10 Q. We just went through how the --  
11 how that numerator is reflected on  
12 Exhibit 2 and how the math certainly  
13 reflected on Exhibit 2 doesn't add up, does  
14 it?  
15 A. What we determined is the  
16 summation of those three numbers does not  
17 equal the total number on the page.  
18 Correct.  
19 Q. Did you do the same -- have you  
20 done an analysis to determine --  
21 I want to turn to the denominator  
22 to see if the denominator numbers, which  
23 are in the columns "Goods available at  
24 cost" and "Total GOB expenses," if those  
25 add up to the totals reflected on Exhibit 2

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1  
2 to your deposition and Exhibit 5 to your  
3 report?  
4 A. Which numbers would you like me  
5 to add up?  
6 Q. Okay. Let's go under "Goods  
7 available at cost."  
8 If you did just for Sears, if you  
9 add up the 205 million figure, the 58  
10 million figure, and the 81 million dollar  
11 figure, do those add up?  
12 A. Approximately 344.  
13 Q. 344, not 321 reflected on  
14 Exhibit 2 to your deposition, correct?  
15 A. Correct.  
16 Q. Or Exhibit 5 to your report; is  
17 that right?  
18 A. Correct.  
19 Q. And if you add the numbers up for  
20 Kmart under "Goods available at cost," 171  
21 million, 34 million, 65 million, those  
22 don't add up to 330 million, do they?  
23 A. Correct.  
24 Q. And therefore the total 651  
25 million reflected on Exhibit 2 to your

Page 50

1  
2 deposition, Exhibit 5 to your report, is  
3 likewise inaccurate, isn't it?  
4 A. I can't draw that conclusion that  
5 it's inaccurate.  
6 Q. It doesn't reflect the totals  
7 above it, does it?  
8 A. It doesn't reflect the totals  
9 above it. It's not to say that it was  
10 supposed to either.  
11 Q. Well, is there anything on this  
12 page that would suggest, where it says  
13 totals, that it would reflect anything  
14 other than a summation of the numbers above  
15 it?  
16 A. But again, this is a summary  
17 schedule that was provided. There may be  
18 other elements that were considered in the  
19 preparation of the total rows that are not  
20 exhibited on the page. So I can't conclude  
21 that it's inaccurate.  
22 Q. You want to testify as to its  
23 accuracy, as you're sitting here today,  
24 based on what you now know?  
25 MR. FOX: Objection.

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1  
2 A. We asked the debtor for a summary  
3 of their GOB sales. This is what was  
4 provided. We assumed that the information  
5 was accurate and utilized it as such.  
6 Q. Well, you got the information  
7 from ESL, correct?  
8 A. ESL is indicated as the provider  
9 of the schedule.  
10 Q. Okay. Did you do the same -- and  
11 the cross-check of the math under the  
12 column "Goods available at cost" that you  
13 just did, that's the first time you've done  
14 that analysis, sitting here today, to check  
15 to see if it's accurate, correct?  
16 A. The first time that I've done the  
17 math, yes.  
18 Q. Let's go to the other column, the  
19 other column that comprises the denominator  
20 of the fraction you were talking about,  
21 "Total GOB expenses."  
22 The components of the 152 million  
23 total are 74 million for Sears and 74  
24 million for Kmart.  
25 Do you see that?

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1  
2 A. The totals?  
3 Q. Yes, sir. Comprising 252 million  
4 of GOB expenses on Exhibit 2 to your  
5 deposition, Exhibit 5 to your report,  
6 right?  
7 A. I do see that.  
8 Q. Can you likewise go through to  
9 see that those numbers are -- that that  
10 math doesn't work either?  
11 (Witness complies.)  
12 MR. FOX: Objection to form.  
13 BY MR. GENENDER:  
14 Q. For the Sears --  
15 A. Which rows did you want me to  
16 add?  
17 Q. Well, total GOB expenses, the  
18 three Sears components don't add up to  
19 \$78,280,763, do they?  
20 A. They add up to approximately 81.  
21 Q. Or 82. They add up to whatever  
22 they add up to, but it's more than that.  
23 It's more than 78 million, isn't it?  
24 A. It's slightly higher than the 78.  
25 Q. Right.

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1  
2 And the three components for  
3 Kmart don't add up to \$74,025,510, do they?  
4 A. No.  
5 Q. What is the effect on your  
6 opinions if the 96.4 percent net recovery  
7 percentage is inaccurate?  
8 MR. FOX: Objection.  
9 A. The question is not whether the  
10 percentage is inaccurate. The question is  
11 whether the net recovery on inventory, as  
12 part of the GOB sales, is accurate or not.  
13 Q. All right. If the actual net  
14 recovery percentage is lower than 96.4  
15 percent, what impact does that have on any  
16 of your conclusions, if you know?  
17 A. Well, I don't know because I  
18 don't know if it's inaccurate and I don't  
19 know how much it would reduce the 96.4 or  
20 more importantly, the aggregate, the net  
21 dollar level of recovery in the GOB sales.  
22 Q. I'm going to hand you what's been  
23 marked as Exhibit 3.  
24 (Henrich Exhibit 3, Document  
25 entitled "GOB Store Performance

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1  
2 (Post-Ch. 11 Bankruptcy Filing),  
3 Bates-stamped ESL\_507B\_0000001, marked  
4 for identification, as of this date.)  
5 BY MR. GENENDER:  
6 Q. Even though it has an ESL Bates  
7 label at the bottom, is not a document  
8 produced by ESL, okay? I will represent to  
9 you that it is a corrected version of this  
10 spreadsheet to correct the math, okay?  
11 MR. FOX: Wait a minute. Where  
12 did this come from?  
13 MR. GENENDER: I'm speaking. I'm  
14 in the process of telling him where  
15 it's coming from. Can I finish?  
16 MR. FOX: I'm listening.  
17 MR. GENENDER: Thank you. Let me  
18 proceed without interruption.  
19 BY MR. GENENDER:  
20 Q. Exhibit 3 is a document that we  
21 have prepared to correct the math in  
22 Exhibit 2, which is also Exhibit 5 to your  
23 report, okay?  
24 Do you have that in front of you?  
25 A. I do.

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1  
2 Q. Do you have a calculator with  
3 you?  
4 A. I do.  
5 Q. Okay. I'd like you to check the  
6 math on Exhibit 3, please.  
7 MR. FOX: I'm going to object to  
8 this. You want to ask him questions,  
9 you can ask him questions. This is  
10 not a -- it's not a math exercise.  
11 BY MR. GENENDER:  
12 Q. Are you able to check the math on  
13 Exhibit 3?  
14 A. Am I able to?  
15 Q. Yes, sir.  
16 A. I mean I could go through the  
17 same exercise we went through before, if  
18 that's what you're asking.  
19 Q. Sure. You can do it however you  
20 deem appropriate.  
21 I'd like you to check the totals  
22 to do what you need to do to get  
23 comfortable that the numerator and the  
24 denominator that you testified to from  
25 Exhibit 2 to your deposition, Exhibit 5 of

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1  
2 your report, that the correct totals are  
3 actually on Exhibit 3 that I've handed you.  
4 MR. FOX: Paul, I'm going to  
5 object to this.  
6 MR. GENENDER: Okay.  
7 MR. FOX: The witness -- first of  
8 all --  
9 MR. GENENDER: No speaking  
10 objections.  
11 MR. FOX: No, because you're  
12 asking about an exhibit that you  
13 created that this witness has never  
14 seen before, didn't rely on.  
15 If you want to challenge the  
16 math, go ahead, but you're not going to  
17 put these words in this witness' mouth.  
18 MR. GENENDER: I object to the  
19 speaking objection.  
20 BY MR. GENENDER:  
21 Q. Can you get your calculator out,  
22 please?  
23 MR. FOX: Well, I'm going to  
24 object.  
25 BY MR. GENENDER:

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1  
2 Q. You have Exhibit 3 in front of  
3 you? Can you hold it side by side to  
4 Exhibit 2? Can you hold them side by side?  
5 MR. FOX: Paul, I'm going to  
6 object to this. Okay. Excuse me.  
7 MR. GENENDER: You're  
8 interrupting --  
9 MR. FOX: I understand. You  
10 can't create your own document.  
11 MR. GENENDER: Ed, Ed, I can  
12 do --  
13 MR. FOX: Where did it come from?  
14 MR. GENENDER: I just told you.  
15 It's a corrected version because --  
16 MR. FOX: You said it's  
17 corrected.  
18 MR. GENENDER: I'm trying to  
19 establish that.  
20 MR. FOX: But this witness can't  
21 identify it. He doesn't know what it  
22 is.  
23 BY MR. GENENDER:  
24 Q. Mr. Henrich, do you have  
25 Exhibit 3 next to Exhibit 2?

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1  
2 A. I do.  
3 Q. Do you have them side by side?  
4 Can you see that the columns for  
5 "GOB sales, Goods available at cost" and  
6 "Total GOB expenses" for each of the three  
7 announced dates for Sears, Kmart, and the  
8 totals for each of those as it relates to  
9 Exhibit 2 and as it relates to Exhibit 3,  
10 that those figures are identical?  
11 A. I beg your pardon? Were you  
12 pointing to the first row?  
13 Q. Do you see the "GOB sales"  
14 column?  
15 A. I understand the column.  
16 Which row were you referring to?  
17 Q. Nine figures below it.  
18 A. Okay.  
19 Q. And then "Goods available at  
20 cost," the nine figures below it.  
21 A. Okay.  
22 Q. "Total GOB expenses" and the nine  
23 figures below it.  
24 Can you see that those total of  
25 27 figures are identical as between

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1  
2 Exhibit 2 and Exhibit 3?  
3 MR. FOX: Again, I'm just going  
4 to object to the entire line of  
5 questioning. It's completely  
6 inappropriate.  
7 (Document review.)  
8 A. Those 27 numbers that you  
9 referred to are identical.  
10 Q. Okay. Now I'm going to ask you  
11 to take your calculator and add up under  
12 "GOB sales" the total for Sears, the total  
13 for Kmart, and the total combined, and see  
14 what they come to and see if they come to  
15 the number reflected on Exhibit 3.  
16 MR. FOX: Objection.  
17 THE WITNESS: Should I proceed?  
18 MR. FOX: If you want. I think  
19 this is inappropriate.  
20 MR. GENENDER: You can think  
21 whatever you want. I think it's  
22 inappropriate that your expert offered  
23 opinions based on bad math, but I would  
24 just like -- or you can stipulate to  
25 the numbers however you want to do it.

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1  
2 MR. FOX: We are not going to  
3 stipulate that a document that we  
4 didn't prepare that this witness never  
5 saw and that he didn't create and we  
6 don't know who created it.  
7 MR. GENENDER: And he didn't  
8 check. Please do the math.  
9 MR. FOX: He's not here to do a  
10 math exercise.  
11 MR. GENENDER: Are you --  
12 MR. FOX: You can ask him  
13 questions. You can't tell him to do  
14 calculation.  
15 MR. GENENDER: Do I need to get  
16 Judge Drain on the phone? I'm trying  
17 to conduct a deposition efficiently  
18 without interruption.  
19 MR. FOX: Paul, I understand  
20 that.  
21 BY MR. GENENDER:  
22 Q. Can you please add the following  
23 three numbers, Mr. Henrich: 251,199,766,  
24 plus 71,762,679, plus 98,267,824?  
25 A. I have added those numbers.



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1  
2 Q. And what does that come out to?  
3 A. 421,230,269.  
4 Q. The same number reflected under  
5 Sears total on Exhibit 3, correct?  
6 A. Correct.  
7 Q. Can you do the same exercise for  
8 the Kmart figures?  
9 MR. FOX: Paul, I think we can  
10 short-circuit this.  
11 MR. GENENDER: Please.  
12 MR. FOX: Okay. Hang on one  
13 second.  
14 MR. GENENDER: I don't want to  
15 hear from either one of you on the  
16 record.  
17 MR. FOX: I think we will be able  
18 to stipulate to what you're trying to  
19 get to.  
20 MR. GENENDER: Thank you. Fair.  
21 MR. FOX: But hang on. Give me a  
22 minute.  
23 MR. GENENDER: Absolutely.  
24 MR. FOX: Can we take a break?  
25 We don't have a question pending.

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1  
2 MR. GENENDER: I can take a  
3 break. I just don't want you talking  
4 to the witness. Is that fair?  
5 MR. FOX: I understand.  
6 MR. GENENDER: Normally, you can  
7 talk to the witness. On this  
8 particular --  
9 MR. FOX: Yeah, I gotcha.  
10 MR. GENENDER: If you're not  
11 going to talk to the witness about this  
12 line of questioning.  
13 MR. FOX: We're going to see if  
14 we can stipulate to what you want.  
15 MR. GENENDER: I'm good with  
16 that.  
17 MR. FOX: And give us five  
18 minutes.  
19 MR. GENENDER: Okay.  
20 (Recess is taken.)  
21 MR. FOX: A couple of things.  
22 First of all, I want it noted on the  
23 record that what we're looking at in  
24 both Exhibit 2 and Exhibit 3 are Excel  
25 spreadsheets on paper, which means that

Page 63

1  
2 data that is in the computerized  
3 version, formulas, et cetera, is not  
4 reflected on the paper copy that's been  
5 marked as an exhibit.  
6 We agree on that?  
7 MR. GENENDER: Keep going.  
8 MR. FOX: Well, that's -- that I  
9 want to put on the record.  
10 MR. GENENDER: You just did.  
11 MR. FOX: Okay. Secondly, to the  
12 question you were asking, I think --  
13 MR. GENENDER: Hang on, what are  
14 you stipulating to? I don't want a  
15 speech.  
16 MR. FOX: I just wanted to make  
17 sure I'm going to the right columns.  
18 So you were going to ask next about  
19 "Goods available at cost" and the math  
20 in that column.  
21 MR. GENENDER: Yes.  
22 MR. FOX: We'll stipulate that  
23 the numbers under the column "Goods  
24 available at cost" for FLS add up to  
25 345,685,370, and for Kmart in that

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1  
2 column add up to 271,514,681, and those  
3 two numbers together total 617,200,051.  
4 And with respect to, I think,  
5 "Total GOB expense" is next?  
6 MR. GENENDER: You didn't finish  
7 "GOB sales." You're going to stipulate  
8 to those three numbers?  
9 MR. FOX: I'm sorry, which? Oh,  
10 yes. Sorry. I thought we were  
11 finished with that.  
12 So under the column "GOB sales"  
13 we'll stipulate that the numbers for  
14 FLS total to 421,230,269. The numbers  
15 under "GOB sales" for Kmart total to  
16 312,828,244, and this is all on  
17 Exhibit 3, and that those two numbers  
18 total to 734,058,513.  
19 And then you want to go to "Total  
20 GOB expense"?  
21 MR. GENENDER: Yes.  
22 MR. FOX: We'll stipulate on  
23 "Total GOB expense" that the numbers  
24 under that column for FLS total to  
25 82,743,998 and that the numbers for



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1  
2 Kmart under "Total GOB expense" on  
3 Exhibit 3 total to 61,289,175, and that  
4 those two numbers, totals for FLS and  
5 Kmart add to 144,033,173.  
6 MR. GENENDER: Thank you.  
7 BY MR. GENENDER:  
8 Q. Mr. Henrich, would you also agree  
9 that taking, comparing Exhibits 2 and 3  
10 side by side, that the difference between  
11 GOB sales less GOB expenses, just those two  
12 columns, as between Exhibits 2 and 3 are  
13 different, aren't they?  
14 A. Yes.  
15 Q. Exhibit 2, we don't need to get  
16 into, the exact math is what it is, but  
17 rough math 774 million-plus less 152  
18 million-plus is approximately 622 million,  
19 correct?  
20 A. Correct.  
21 Q. That number in Exhibit 3 with the  
22 corrected math that your counsel just  
23 stipulated to yields -- math yields a  
24 difference between 734 million-plus and 144  
25 million-plus that is 590 million,

Page 66

1  
2 approximately, correct?  
3 A. Correct.  
4 Q. Thank you.  
5 Now you said that the correct  
6 formula to determine net recovery  
7 percentage is to take the "GOB sales"  
8 divided by the "goods available at cost,"  
9 plus the "GOB expenses"; is that right?  
10 A. Yes.  
11 Q. And where do you come up with the  
12 opinion that that's the correct formula to  
13 use to determine net recovery percentage?  
14 A. Again, what we utilized from this  
15 schedule or the schedule that was the  
16 Exhibit 2, which was from our report, which  
17 now presented me a modified version, was  
18 the net recovery dollars. So the GOB  
19 sales, less the total GOB expenses.  
20 Q. Okay. How did you come -- what  
21 informs you that that is -- strike that.  
22 What informs you that that is the  
23 correct formula to use to determine net  
24 recovery percentage?  
25 A. The formula that was used for the

Page 67

1  
2 schedule of net recovery percentage was  
3 taking the cost of goods, adding the cost  
4 of selling those goods, the direct selling  
5 costs of selling those goods, and comparing  
6 that to the revenue that was achieved.  
7 That's the percentage that's on the  
8 schedule.  
9 Q. Your report references the Tiger  
10 reports, doesn't it?  
11 A. It does.  
12 Q. And in what capacity -- for what  
13 purpose does your report rely upon the  
14 Tiger reports?  
15 A. It informs us that, again in the  
16 calculation of our value of the collateral  
17 as of the petition date, we did not utilize  
18 the net recovery percentage. We utilized  
19 the net recovery from the GOB sales, which,  
20 is, as I described previously, the 774,  
21 less the 152. In Exhibit 3 would be the  
22 734, less the 144.  
23 But we also utilized the goods  
24 available at cost as a reduction from the  
25 total inventory to determine what the

Page 68

1  
2 inventory that was to be sold in the  
3 ongoing stores would be as well. So that  
4 would then increase in our calculations  
5 based on, if we were to utilize Exhibit 3,  
6 the lesser amount of goods that were sold  
7 through the GOB Stores.  
8 Q. Can you turn to the third page of  
9 the text of your report, Exhibit 1, where  
10 we were, where the second bullet point  
11 says, "Inventory is liquidated in the 262  
12 GOB stores."  
13 Do you see that?  
14 A. I beg your pardon? Which page.  
15 Q. The third page.  
16 MR. FOX: Are we done with 2 and  
17 3?  
18 MR. GENENDER: No.  
19 BY MR. GENENDER:  
20 Q. Do you have that in front of you?  
21 A. Yes.  
22 Q. Okay. I want to go through a  
23 couple of things, now that you know what  
24 you know.  
25 Would you agree that in the first

Page 69

1  
2 sub-bullet where it says the GOB stores  
3 achieved a recovery of 96.4 percent of  
4 inventory at cost net of all store  
5 expenses.  
6 And then it goes on.  
7 Do you see that? Would you agree  
8 that that percentage should be 95.6?  
9 MR. FOX: I'm going to object to  
10 that.  
11 BY MR. GENENDER:  
12 Q. You can answer.  
13 A. I don't know whether it's right  
14 or wrong. We were given a schedule to  
15 utilize. You've given me a modified  
16 schedule to utilize. In the modified  
17 schedule, the number is 95.6.  
18 The previous number, as we cited  
19 in our report, was 96.4.  
20 Not having prepared the data but  
21 having been provided the data, I can't tell  
22 you which one is accurate or not. But if  
23 the 95.6 is an accurate number, then the  
24 96.4 in the report instead would be 95.6.  
25 Q. All right. And you're referring

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1  
2 to Exhibits 2 and 3 in front of you for  
3 those two figures?  
4 A. Right.  
5 Q. And in that same sub-bullet point  
6 you go on and say, "Produced by the debtors  
7 and provided to me by counsel for  
8 Wilmington Trust."  
9 Do you see that?  
10 A. Yes.  
11 Q. You really mean produced by ESL,  
12 don't you?  
13 MR. FOX: Objection. Asked and  
14 answered.  
15 BY MR. GENENDER:  
16 Q. You can answer.  
17 A. It appears that the schedule was  
18 produced by ESL.  
19 Q. Thank you.  
20 A. Right.  
21 Q. The last sub-bullet point, it  
22 says, "The debtors generated approximately  
23 622.3 million from the GOB stores  
24 liquidations" as reflected in that same  
25 document, which is Exhibit 5 to your report

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1  
2 and Exhibit 2 to your deposition, correct?  
3 A. Correct.  
4 Q. That number really, as a matter  
5 of math, should be approximately 590  
6 million, correct?  
7 MR. FOX: Objection.  
8 Q. You can answer.  
9 MR. FOX: No, there --  
10 Q. You can answer.  
11 MR. FOX: There is no basis for  
12 your question.  
13 BY MR. GENENDER:  
14 Q. You can answer the question.  
15 MR. FOX: There's no foundation  
16 for the question.  
17 MR. GENENDER: You made your  
18 objection. Stop speaking.  
19 BY MR. GENENDER:  
20 Q. Can you answer my question,  
21 please? Looking --  
22 A. Would you repeat the question  
23 please?  
24 Q. Looking at Exhibits 2 and 3.  
25 A. Right.

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1  
2 Q. We just went through this.  
3 A. Right.  
4 Q. Looking at Exhibits 2 and 3, as a  
5 matter of math to which your counsel  
6 stipulated in Exhibit 3, would you agree,  
7 sir, that the difference between the total  
8 GOB sales of 734 million less 144 million  
9 of total GOB expenses is actually 590  
10 million?  
11 MR. FOX: Paul, just to be clear,  
12 we stipulated to the calculation, not  
13 to the veracity of the underlying  
14 numbers.  
15 BY MR. GENENDER:  
16 Q. Can you answer my question,  
17 please?  
18 A. If Exhibit 3 is a more accurate  
19 version of the Exhibit 2 that we utilized,  
20 then your statement would be correct, the  
21 622.3 would be 590 million and plus.  
22 Q. Thank you.  
23 Your \$622.3 million number comes  
24 from Exhibit 2 to your deposition, which is  
25 Exhibit 5 to the report, by subtracting

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1  
 2 774-plus -- by subtracting 152 million from  
 3 774-plus, correct?  
 4 A. Correct.  
 5 Q. Coming up with 622.3 million,  
 6 correct?  
 7 A. Correct.  
 8 Q. If you did the same math, same  
 9 math but subtracting 734 million -- sorry.  
 10 Taking 734 million and  
 11 subtracting 144 million, you'd come up with  
 12 590 million, that math coming from  
 13 Exhibit 3, correct?  
 14 A. Correct.  
 15 Q. Your report references the Tiger  
 16 reports, correct?  
 17 A. Yes.  
 18 Q. And did you review those  
 19 carefully?  
 20 A. I have read the Tiger report.  
 21 Q. Are you familiar with how Tiger  
 22 calculated net recovery values on retail  
 23 store GOB?  
 24 A. Yes.  
 25 Q. I'm handing you what's been

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1  
 2 marked Exhibit 4.  
 3 (Henrich Exhibit 4, Tiger Asset  
 4 Intelligent Report dated 9/28/2018,  
 5 Bates-stamped SEARS\_507B\_00001287  
 6 through 1344, marked for  
 7 identification, as of this date.)  
 8 BY MR. GENENDER:  
 9 Q. Do you recognize that as the  
 10 Tiger Asset Intelligent Valuation Report  
 11 dated September 28th, 2018, inventory date  
 12 October 6th, 2018?  
 13 A. Yes.  
 14 Q. If you will turn to the page that  
 15 in the lower right-hand corner has a Bates  
 16 number SEARS507B\_1309. Tell me when you're  
 17 there.  
 18 A. I am there.  
 19 Q. This is called Exhibit A2 to this  
 20 report, right?  
 21 A. Correct.  
 22 Q. And do you see that there is a  
 23 blended net recovery for combined retail  
 24 store GOB inventory. Towards the bottom of  
 25 the page, it says 91.3 percent?

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1  
 2 A. I see that line item.  
 3 Q. And do you see that that is  
 4 calculated by taking the \$2.152 billion  
 5 number and dividing it by inventory at cost  
 6 of 2.358 billion and arriving by math at  
 7 91.3 percent?  
 8 A. I didn't follow your numbers. I  
 9 apologize. Could can you repeat that  
 10 please?  
 11 Q. Do you see that that 91.3 percent  
 12 is calculated by taking 2.152 billion, the  
 13 blended net recovery for combined retail  
 14 store, retail store GOB inventory, and  
 15 dividing it by the inventory at cost number  
 16 in the denominator, 2.358 billion at the  
 17 top-center column.  
 18 A. Yes, I do.  
 19 Q. And arriving at 91.3 percent?  
 20 A. Yes, I do.  
 21 Q. Can you turn to the second page  
 22 of your report? Second page of text.  
 23 (Witness complies.)  
 24 Q. The first heading is: Analysis  
 25 and Methodologies.

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1  
 2 A. I have that in front of me.  
 3 Q. Your report has an Exhibit 2 to  
 4 it that has a buildup in collateral value;  
 5 is that correct?  
 6 A. That is correct.  
 7 Q. And that chart, which is  
 8 Exhibit 2, really, Exhibit 2A, to your  
 9 report, has a line item for total inventory  
 10 at cost of \$2.576 billion.  
 11 Do you see that?  
 12 A. I do.  
 13 Q. And that figure comes from the  
 14 borrowing base certificate; is that right?  
 15 A. That figure appears on the  
 16 borrowing base certificate, but I believe  
 17 we may have taken that as well from the  
 18 debtors' schedules.  
 19 Q. Did you get it from the borrowing  
 20 base certificate?  
 21 A. If I recall correctly, we took it  
 22 from the debtors' schedules.  
 23 (Henrich Exhibit 5, Borrowing  
 24 Base Certificate, beginning with  
 25 Bates-stamp SEARS\_507B\_00001430, marked

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1  
2 for identification, as of this date.)  
3 BY MR. GENENDER:  
4 Q. I've handed you what I've marked  
5 as Exhibit 5 to your deposition.  
6 Do you recognize that as a true  
7 and correct copy of the borrowing base  
8 certificate as of October 13, 2018?  
9 Do you have that in front of you?  
10 A. I do.  
11 Q. If you would turn to the fourth  
12 page of the document. The first line on  
13 the left, upper left, is inventory per  
14 stock ledger.  
15 Do you see that?  
16 A. I do.  
17 Q. That has the same number we  
18 referred to in Exhibit 2A of your report,  
19 2.576 billion, correct?  
20 A. Correct.  
21 Q. It adds in Home Services.  
22 Do you see that?  
23 A. I do.  
24 Q. And then it has a total stock  
25 ledger inventory of 2.69 billion dollars.

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1  
2 Do you see that?  
3 A. I do.  
4 Q. Your report uses 2.576 billion,  
5 correct?  
6 A. Correct.  
7 Q. And it reduces it by \$651 million  
8 for inventory at cost, correct? GOB  
9 liquidation inventory at cost, correct?  
10 A. To calculate the amount of  
11 inventory in the Go-Forward stores,  
12 correct.  
13 Q. And that uses the number, the  
14 number from Exhibit 2 to your deposition,  
15 Exhibit 5 to your report, correct?  
16 A. Correct.  
17 Q. That we determined on Exhibit 3  
18 as a matter of math, it should be 617  
19 million, correct?  
20 MR. FOX: Objection to form.  
21 A. That Exhibit 3 reflects a  
22 different number.  
23 Q. Of 617 million, correct?  
24 A. Correct.  
25 Q. All right. Now looking at --

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1  
2 going back to your total inventory at cost,  
3 you used 2.576 billion, which is referenced  
4 in the borrowing base certificate on the  
5 fourth page that is Exhibit 5 to your  
6 deposition.  
7 That's the number you used,  
8 right?  
9 A. Right, as aforementioned, we were  
10 uncertain whether the Home Services  
11 inventory was collateral that should be  
12 included in our calculations or not, so  
13 conservatively we did not utilize it.  
14 Q. Conservatively, you did not  
15 include 114.6 million of Home Services  
16 inventory, correct?  
17 A. Correct.  
18 Q. But you also, not so  
19 conservatively --  
20 MR. FOX: Objection.  
21 Q. -- didn't use the net eligible  
22 inventory figure from the borrowing base  
23 certificate of 2.391 million, did you?  
24 MR. FOX: Objection.  
25 Q. Do you see that figure in the

Page 80

1  
2 borrowing base certificate?  
3 A. I didn't hear over the objection  
4 what number you stated.  
5 Q. Do you have the borrowing base  
6 certificate?  
7 A. I do. I have it in front of me.  
8 I didn't hear which number you stated.  
9 Q. Do you see where it says "net  
10 eligible inventory"?  
11 A. Yes.  
12 Q. \$2.391 billion?  
13 A. Yes.  
14 Q. Actually, \$2.391.5 billion?  
15 A. Yes.  
16 Q. You did not use that figure, did  
17 you?  
18 A. No.  
19 Q. You'd agree that that number is  
20 approximately \$185 million less than the  
21 number you actually used, correct?  
22 A. By math, yes.  
23 Q. Why did you not use that number?  
24 A. Because ineligible inventory  
25 still has value -- still has value. It's

Page 81

1  
2 just a means by which a lender creates  
3 reserves upon which to lend against, but it  
4 doesn't detract from the value of the  
5 inventory.  
6 Q. You include in Exhibit 2A to your  
7 report, \$72.8 million for pharmacy  
8 prescription list asset value.  
9 Do you see that?  
10 A. I do.  
11 Q. Prescription lists are not 2L  
12 collateral, are they?  
13 MR. FOX: Objection.  
14 A. Could you repeat the question.  
15 Q. Is it your testimony that those  
16 pharmacy prescription lists assets are 2L  
17 collateral?  
18 A. We believe that it is. We  
19 believe that it is.  
20 Q. What's your basis for that  
21 belief?  
22 A. Because the collateral in the  
23 security agreement for the second lien  
24 lenders identifies all inventory and then  
25 in addition it identifies that as

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1  
2 collateral documents related to inventory  
3 and books and records related to inventory.  
4 So the pharmacy lists, pharmacy  
5 inventory, is part of total inventory and  
6 therefore the documents which would include  
7 the scripts, related to it, would be  
8 included. That's in the first instance.  
9 In the second instance, it is  
10 specifically identified in the collateral  
11 agreement for the first lien lenders as  
12 being first lien collateral, and as we were  
13 identifying the total or calculating the  
14 total value of -- the value of the total  
15 collateral, and as the report indicates, we  
16 assumed that the first lienholders would  
17 consume their collateral first, it was  
18 appropriate to include the prescription  
19 list asset value in the calculation.  
20 Q. Would you agree something can be  
21 first lien collateral and not second lien  
22 collateral, correct?  
23 A. Something can be.  
24 Q. Okay. Do you have a document  
25 that reflects that 72.8 million for

Page 83

1  
2 pharmacy prescription list asset value  
3 should be included?  
4 MR. FOX: Objection to the form.  
5 A. Do I have a document that points  
6 to whether it should be included?  
7 Q. Yes.  
8 A. No. As I indicated, our  
9 interpretation, our assumption with respect  
10 to the second lien collateral was that it  
11 incorporated all inventory and the  
12 documents and books and records related to  
13 it. It was also specifically identified as  
14 first lien collateral. And given that we  
15 were creating this valuation based on  
16 collateral from both what was exclusive to  
17 the first lienholders, as well as the  
18 second lienholders, it was appropriate to  
19 include it in the calculation.  
20 Q. Where did you get the  
21 \$72.8 million number from?  
22 A. That was a document that we  
23 received from the debtors, that they  
24 provided their value.  
25 Q. Do you recall the date of the

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1  
2 document?  
3 A. I do not.  
4 (Henrich Exhibit 6, Document with  
5 Estimated Script Asset Value, beginning  
6 with Bates-stamp SEARS\_507B\_00001508,  
7 marked for identification, as of this  
8 date.)  
9 BY MR. GENENDER:  
10 Q. I'm handing you what I marked as  
11 Exhibit 6 to your deposition, Bates labeled  
12 Sears 507B1508.  
13 Do you have that in front of you?  
14 A. I do.  
15 Q. Is that the document to which  
16 you're referring?  
17 A. Yes.  
18 Q. Do you see a date on this  
19 document?  
20 MR. FOX: Paul, hold on one  
21 second. Let me just ask you to wait  
22 one second while we check something.  
23 MR. GENENDER: Okay.  
24 MR. FOX: I just want to make  
25 sure this document is the same as what



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1  
2 he actually relied on.  
3 MR. GENENDER: Okay.  
4 (Document review.)  
5 MR. PARADISE: I haven't second  
6 chaired a deposition in a long time.  
7 Sorry guys.  
8 MR. GENENDER: Let's go off the  
9 record for a second.  
10 (Discussion off the record.)  
11 MR. FOX: Paul, you can go ahead  
12 but we want --  
13 MR. GENENDER: You can reserve  
14 your right.  
15 MR. FOX: I don't want to hold  
16 you up.  
17 MR. GENENDER: It's the same  
18 document I used on Saturday.  
19 MR. FOX: I know and there were  
20 some questions then.  
21 MR. GENENDER: We put the  
22 tracking pages on the front so that it  
23 was clear.  
24 MR. FOX: I just want to make  
25 sure it's what the witness saw when

Page 86

1  
2 they prepared the report.  
3 MR. GENENDER: Fair enough.  
4 MR. PARADISE: Keep going. We'll  
5 reserve.  
6 BY MR. GENENDER:  
7 Q. Mr. Henrich, as you sit here, and  
8 your counsel can confirm whether it's  
9 actually something that is in their files  
10 of what you reviewed, but at least your  
11 base recollection, this is a document you  
12 relied upon to come up with the  
13 \$72.8 million figure; is that right?  
14 A. It's in the same format of the  
15 document that we utilized. It looks  
16 familiar, whether it is exactly the same, I  
17 can't stipulate, but it looks very similar.  
18 Q. And is there a date on Exhibit 6  
19 that you can see?  
20 A. I do not see a date on Exhibit 6.  
21 Q. Okay. Let's go to the Tiger  
22 report which we marked as Exhibit 5.  
23 That's not true. Let's go to the Tiger  
24 report which we had marked as Exhibit 4,  
25 please.

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1  
2 (Witness complies.)  
3 Q. And let's go to page 8.  
4 Do you see in the lower -- and  
5 the Tiger report, you recall, is dated as  
6 of October 6th, 2018, which is nine days  
7 before the petition date, correct?  
8 A. Correct.  
9 Q. Okay. Page 8, lower right-hand  
10 corner, do you see it says in that  
11 paragraph, in the middle of the paragraph,  
12 second sentence it says, "Based on an  
13 estimated return of \$5 per prescription,  
14 the script lists would have a value of up  
15 to \$27 millions.  
16 Do you see that?  
17 A. I see that. But --  
18 Q. That being said, the number you  
19 used on your Exhibit 2A is a number of  
20 72.8 million, which is 45.8 million, at  
21 least \$45.8 million more than what the  
22 Tiger report refers to, correct?  
23 A. That's correct. But you can't  
24 read it in isolation without reading the  
25 first paragraph above it as well.

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1  
2 Q. Okay. Well, tell me how you  
3 would get -- the first paragraph above it  
4 would change the Tiger report's view that  
5 the prescription script list would have a  
6 value of up to \$27 million?  
7 A. The first paragraph stipulates  
8 the assumptions upon which they ascribed a  
9 value. They identify that the pharmacies  
10 were located in the Go-Forward store  
11 locations. And then indicate, however, if  
12 they had been part of a GOB scenario, which  
13 this appraisal was on the basis that the  
14 entire entity would be liquidated. In a  
15 liquidation they're suggesting that it  
16 would have a \$5 per prescription or  
17 \$27 million value.  
18 But the Go-Forward collateral  
19 should be valued at its fair market value  
20 and the value that was ascribed to it by  
21 the debtors was the \$72.8 million number.  
22 Q. Recognizing you don't know the  
23 date on -- you don't have a date of when  
24 Exhibit 6 was prepared, correct?  
25 A. Correct.



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1  
2 Q. And --  
3 A. And our request was for the  
4 valuation as of the petition date, and this  
5 is what we received in return -- in  
6 response.  
7 Q. And of course your number assumes  
8 that the scripts, the pharmacy prescription  
9 lists themselves are even 2L collateral,  
10 correct?  
11 A. I'm sorry. Can you repeat the  
12 question?  
13 Q. Your inclusion of the  
14 \$72.8 million figure assumes that the  
15 pharmacy prescription list assets are  
16 appropriate 2L collateral, correct?  
17 MR. FOX: Objection. Asked and  
18 answered. You can answer.  
19 A. We assumed that it was 2L  
20 collateral, but it was still appropriate to  
21 include even if it was determined that it  
22 would be exclusive to the first lien.  
23 But, yes, we did assume it was  
24 appropriate to include.  
25 Q. And if it's not appropriate to

Page 90

1  
2 include, that would decrease your  
3 collateral value by that amount, correct?  
4 A. Just by math?  
5 Q. Yes.  
6 A. Yes.  
7 Q. And by fact?  
8 A. By math.  
9 Q. And on that same page you have  
10 \$64.3 million of credit card deposits in  
11 transit.  
12 Do you see that?  
13 A. I do.  
14 Q. Now if you'll look, where does  
15 that figure come from, \$64.3 million for  
16 credit card deposits in transit?  
17 A. The debtors' schedules.  
18 Q. Did you consider the borrowing  
19 base certificate in including that number?  
20 A. The debtor identified that it had  
21 cash equivalents of deposits in transit as  
22 of the petition date of 64.3 and there is a  
23 distinction between the petition date and  
24 the date of the borrowing base certificate.  
25 MR. GENENDER: I'm going to

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1  
2 object to the answer as nonresponsive.  
3 BY MR. GENENDER:  
4 Q. My question is, did you consider  
5 the borrowing base certificate in including  
6 \$64.3 million of credit card deposits in  
7 transit?  
8 A. Our source was the debtors'  
9 schedule. That's what we utilized.  
10 Q. The date of the borrowing base  
11 certificate is October 13, 2018, correct?  
12 A. Yes.  
13 Q. The petition date was?  
14 A. October 15th.  
15 Q. Okay. The borrowing base  
16 certificate includes an eligible credit  
17 card receivables figure of \$54.8 million,  
18 correct?  
19 A. I see that in the borrowing base,  
20 yes.  
21 Q. Had you used that, your inventory  
22 valuation would be \$10 million lower,  
23 correct?  
24 A. Again, by math, had we used that  
25 number, but we used the amount identified

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1  
2 in the debtors' schedules.  
3 But if we had used a different  
4 number, the 54.8, it would have been less.  
5 Q. And you include 14-and-a-half  
6 million dollars of pharmacy accounts  
7 receivable, correct?  
8 A. Correct.  
9 Q. In Exhibit 2A to your report?  
10 A. Correct.  
11 Q. And that number is contained in  
12 the borrowing base certificate on the same  
13 page, "Pharmacy accounts receivable,"  
14 14.5 million.  
15 Do you see that?  
16 A. I do.  
17 Q. What is the probability, based on  
18 your experience, of collecting ineligible  
19 receivables as reflected in the borrowing  
20 base?  
21 MR. FOX: Objection to form.  
22 BY MR. GENENDER:  
23 Q. If you know.  
24 A. That's very subjective.  
25 Q. Do you have experience trying to

Page 93

1  
2 collect what a borrowing base certificate  
3 refers to as ineligible receivables?  
4 A. Yes.  
5 MR. FOX: Objection.  
6 Q. What experience do you have in  
7 that regard?  
8 A. I have worked with numerous  
9 companies that have asset-based lending,  
10 ABL loans, and that produce borrowing  
11 bases, and their ineligible receivables are  
12 often a reserve that lenders impose to  
13 reduce the amount that they're going to  
14 lend against.  
15 But that certainly doesn't  
16 preclude that the companies are able to  
17 collect on those ineligibles. Oftentimes  
18 they are. They may just have slow payers.  
19 Q. Exhibit 2A, you include  
20 \$116.2 million of cash in your collateral  
21 build up, don't you?  
22 A. We do.  
23 Q. That assumes that cash is 2L  
24 collateral, doesn't it?  
25 A. No. It assumes, and I think we

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1  
2 state in the report, that it is exclusive  
3 collateral to the first lien lenders and we  
4 assumed that they would consume that first,  
5 and it was appropriate to include in the  
6 entire collateral valuation.  
7 Q. If that cash was not available to  
8 be consumed by the first lien lenders, then  
9 it should not be included in the schedule  
10 which is Exhibit 2A to your report,  
11 correct?  
12 MR. FOX: Objection to form.  
13 A. Cash is their collateral.  
14 Q. No. That's not my question.  
15 If the cash that is reflected on  
16 Exhibit 2A were not available for the first  
17 lienholders to collect against, then it  
18 would not be appropriately reflected on  
19 Exhibit 2A, correct? As 2L collateral?  
20 MR. FOX: Objection to form.  
21 A. If it was not -- if it was not  
22 their collateral or if it was not available  
23 to them because it was restricted, which we  
24 did not include restricted amounts, then it  
25 would not be -- if it was restricted, then

Page 95

1  
2 it would not be included on the schedule.  
3 Q. Or if it just weren't available  
4 to be collected upon by the 1Ls, then it  
5 shouldn't be on this report -- on this  
6 chart, correct?  
7 MR. FOX: Objection to form.  
8 A. I don't -- I don't know what that  
9 means, not available to be collected. It's  
10 cash.  
11 Q. You agree that the cash is not 2L  
12 collateral, per se, correct?  
13 A. Correct.  
14 MR. FOX: Objection to form.  
15 BY MR. GENENDER:  
16 Q. Thank you.  
17 The only reason you're including  
18 it there is because you think that the 1Ls  
19 would collect their loan against it and  
20 therefore move the 2Ls up so there would be  
21 an additional \$116.2 million available for  
22 the 2Ls to capture.  
23 Is that your premise?  
24 A. Yes, they would collect their  
25 exclusive collateral first and then share

Page 96

1  
2 in the shared collateral.  
3 Q. Looking at Exhibit 2A, just to be  
4 clear, where you add in in the middle of  
5 the page a number for GOB liquidation  
6 inventory at cost.  
7 Do you see that, 651.6 million?  
8 A. I do.  
9 Q. And you get that from Exhibit 2  
10 to your deposition, Exhibit 5 to your  
11 report, correct?  
12 A. Correct.  
13 Q. Exhibit 3 to your deposition,  
14 that number is 617,200,000, correct?  
15 MR. FOX: Objection.  
16 BY MR. GENENDER:  
17 Q. Corresponding number is  
18 617.2 million, correct?  
19 MR. FOX: Objection.  
20 A. The corresponding number on  
21 Exhibit 3 is as you described.  
22 Q. 617.2 million, correct?  
23 A. Correct.  
24 Q. As a matter of math, that's  
25 \$34.2 million difference, correct?

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1  
2 A. Correct.  
3 Which would increase the  
4 Going-Concern inventory at cost as well.  
5 Q. I want to talk about --  
6 MR. GENENDER: I want to object  
7 to everything after the word "correct"  
8 in the last answer as nonresponsive.  
9 BY MR. GENENDER:  
10 Q. I want to talk about your  
11 Going-Concern valuation on pages 3 and 4 of  
12 your report, third and fourth pages of  
13 text. I'd like a stipulation that if you  
14 ever prepare a report again in a case in  
15 which I'm involved, that you will number  
16 the pages, please? Is that fair?  
17 A. That is extraordinarily fair.  
18 Q. Can we have that go into  
19 perpetuity?  
20 A. It was -- yes.  
21 Q. Good. Fair enough. We're all  
22 saying that with smiles on our faces.  
23 The third and fourth pages of  
24 text, okay.  
25 (Document review.)

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1  
2 Q. The top of page 4 of your report  
3 you say, "Based upon my analysis I have  
4 utilized the same store expense  
5 relationship in the ongoing stores as was  
6 reported for the GOBs or 23.4 percent of  
7 inventory at cost."  
8 Do you see that?  
9 A. I do.  
10 Q. Why is that reasonable to apply  
11 that number to a Going-Concern value?  
12 A. So we recognized that there  
13 needed to be recognition of direct selling  
14 expenses associated with the sale of  
15 inventory in the Go-Forward stores.  
16 We recognized that the  
17 relationship from Exhibit 2, direct selling  
18 expenses to the inventory, was 23.4  
19 percent.  
20 We believed that the relationship  
21 in terms of the occupancy, the staffing,  
22 and all the expenses that are incorporated  
23 by direct selling expenses would be  
24 somewhat proportional to the amount of  
25 inventory and space that inventory

Page 99

1  
2 occupied.  
3 And accordingly we applied the  
4 same percentage to the Go-Forward  
5 inventory.  
6 Q. Doesn't that imply an approximate  
7 12.4 percent margin, if you know?  
8 A. I don't know where you're  
9 calculating that number from.  
10 Q. Do you know what Sears's  
11 historical margins were?  
12 A. In the Go-Forward stores, the  
13 more recent sales, the margins that were  
14 achieved were in excess 30 percent-plus.  
15 In all the Go-Forward business  
16 plans the debtor assumed, on average, a 29  
17 percent gross margin.  
18 And the 29 percent gross margin  
19 is what we utilized to determine the  
20 revenue related to the sales of the  
21 Go-Forward inventory.  
22 Q. Are you familiar with what  
23 Sears's historical EBITDA was on a retail  
24 4-wall basis?  
25 MR. FOX: Objection to form.

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1  
2 What period of time are you talking  
3 about?  
4 MR. GENENDER: Historically.  
5 MR. FOX: What does that mean?  
6 They've been around for 100-something  
7 years.  
8 MR. GENENDER: You've made your  
9 objection.  
10 A. The debtors, this was part of  
11 declarations that were made by various  
12 individuals as the -- as there were various  
13 reporting -- reports, and the business  
14 plans that were included as part of those  
15 declarations certainly indicated that  
16 historically, and this is over years which  
17 the company was losing money, which  
18 eventually contributed to the company  
19 landing in bankruptcy, but it also  
20 indicated that the recent performance of  
21 the retail operations for the Go-Forward  
22 stores were profitable.  
23 Q. Including --  
24 MR. FOX: He's not finished with  
25 his answer. Let's let him finish.

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1  
2 A. And, as indicated, that it  
3 wasn't -- those plans indicated that -- or,  
4 though, the expectation for the Go-Forward  
5 stores that they would generate even EBITDA  
6 in the -- potentially in the 5 to 6 percent  
7 range.  
8 We actually used a slightly more  
9 conservative number and assumed it in the  
10 4 percent range.  
11 Q. Does your calculation include  
12 overhead costs?  
13 A. Yes.  
14 Q. Are you aware that in the recent  
15 period of time retail 4-wall EBITDA was  
16 flat to negative?  
17 MR. FOX: Objection to form.  
18 A. I don't know what period of time  
19 you're referring to. I don't know whether  
20 that refers to a subset of stores or not,  
21 which stores that refers to.  
22 Q. Page four of your report, the  
23 fourth sub-bullet point under your first  
24 main bullet point, you state, "It is my  
25 opinion that the overall result, 4 percent

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1  
2 net operating income before debt service in  
3 margin, is reasonable and reflects  
4 normalized ongoing operations, 29 percent  
5 margin, 20 percent store expense, and  
6 5 percent corporate overhead.  
7 Do you see that?  
8 A. I do.  
9 Q. And then you base that on Bill  
10 Transier's declaration dated February 1,  
11 2019; is that right?  
12 A. Correct.  
13 (Henrich Exhibit 7, Declaration  
14 of William L. Transier, marked for  
15 identification, as of this date.)  
16 BY MR. GENENDER:  
17 Q. I'm going to hand you the  
18 declaration of William Transier marked as  
19 Exhibit 7.  
20 Is this the document to which  
21 you're referring on page 4 of your report,  
22 declaration dated February 1, 2019?  
23 A. I don't have mine to compare the  
24 two. I'm assuming it is one in the same.  
25 Q. Can you turn to page 37 that you

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1  
2 cite in your report, 37 of Mr. Transier's  
3 declaration, which is Exhibit 7.  
4 (Witness complies.)  
5 A. I've turned to that page.  
6 Q. Show me where it says a 4 percent  
7 net operating income before debt service  
8 and profit, that that's reflected or  
9 supported by Mr. Transier?  
10 A. As I mentioned a minute ago, this  
11 forecast indicates, on average, actually a  
12 6 percent retail EBITDA margin for the  
13 fiscal year.  
14 Q. It does.  
15 A. And as I indicated, we took a  
16 more conservative approach.  
17 Q. Your bullet point reflects --  
18 let's look at Mr. Transier's chart here,  
19 the chart in his declaration.  
20 He's got a margin percent of 29,  
21 right? Do you see that?  
22 A. I do.  
23 Q. And you referred to 20 percent  
24 store expenses, right?  
25 A. Correct.

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1  
2 Q. And you refer to 5 percent  
3 corporate overhead, right?  
4 A. Correct.  
5 Q. Show me where on page 37 of  
6 Exhibit 7 that you cite in your report that  
7 the 6 percent margin percentage in any way,  
8 shape, or form takes into account  
9 the corporate overhead?  
10 A. Well, it does not depict it on  
11 this page.  
12 Q. Okay. Let's take your numbers  
13 and then we can talk about Mr. Transier's  
14 numbers, okay? Your number is 29 percent  
15 gross profit minus 20 percent store expense  
16 minus 5 percent corporate overhead equals  
17 4 percent net operating income; is that  
18 correct?  
19 A. Correct.  
20 Q. Okay. 29 minus 20 minus five  
21 equals four?  
22 A. Correct.  
23 Q. Do you believe the corporate  
24 overhead number that you used is accurate?  
25 A. Again, that was an estimation

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1  
2 that we utilized and we --  
3 Q. Go ahead.  
4 A. -- we saw that the corporate --  
5 pursuant to the Tiger liquidation analysis,  
6 that the corporate overhead was 3.1 percent  
7 of inventory at cost.  
8 We believed that for a  
9 Going-Concern operation for the Go-Forward  
10 stores, that there would be greater level  
11 of overhead required to manage the  
12 Go-Forward stores.  
13 And based on general experience,  
14 we then assumed not 3.1 percent of  
15 inventory, but we assumed 5 percent of  
16 revenue as a reasonable corporate overhead  
17 allocation.  
18 Q. Do you see page 37 of  
19 Mr. Transier's declaration, Exhibit 7? It  
20 has a figure for operating expenses just  
21 like you do, right? I mean, you have a 20  
22 percent operating -- 20 percent store  
23 expenses and he has it in terms of dollars,  
24 correct?  
25 A. Correct.

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1  
2 Q. Which could be converted into a  
3 percentage, correct?  
4 A. I'm sorry, could you repeat the  
5 question, please?  
6 Q. Well, he has one -- he has store  
7 operating expenses of 1.482?  
8 A. Correct.  
9 Q. Billion. That could be converted  
10 into a percentage, correct?  
11 A. It could, yes.  
12 Q. Just by the math, it would be  
13 about 23 percent, wouldn't it?  
14 A. I have not calculated it.  
15 Q. But the difference between 29  
16 percent and 6 percent, the only figure in  
17 between is that operating expense number,  
18 correct?  
19 A. Correct.  
20 Q. So he actually has 29 percent  
21 less 23 percent equals 6 percent margin  
22 without taking into effect corporate  
23 overhead, correct?  
24 A. Well, we don't know exactly  
25 what's included.

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1  
2 Q. But it's not --  
3 MR. FOX: Objection. You have to  
4 let him answer, Paul. You can't  
5 interrupt.  
6 A. We don't know exactly what's  
7 embedded in his line item of operating  
8 expenses.  
9 Again, we -- we looked at 20  
10 percent of store expenses, which was  
11 comparable to -- so 20 percent on revenue  
12 for store expenses was comparable to the  
13 percentage that we assumed -- that we  
14 assumed as a percentage of inventory at  
15 cost. And so that was for the direct  
16 selling expenses related to the Go-Forward  
17 stores.  
18 And then we applied a corporate  
19 overhead number. So we don't have a direct  
20 comparison as to what he's incorporating in  
21 operating expenses versus the way that  
22 we've approached it.  
23 Q. Well, you actually do. Because  
24 you're citing page 37 of Mr. Transier's  
25 report in your report, correct? You're

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1  
2 citing this page?  
3 MR. FOX: Objection to form.  
4 BY MR. GENENDER:  
5 Q. Right?  
6 A. Well, yeah --  
7 Q. Are you citing this page of his  
8 report?  
9 A. I am. In the 29 percent margin  
10 is --  
11 Q. Can you -- my question is, you  
12 answered my question. Thank you.  
13 Can you read the top line in big  
14 letters, the top of page 37 of  
15 Mr. Transier's February 1st declaration,  
16 which is Exhibit 7 to your deposition?  
17 A. "A smaller but balanced Sears and  
18 Kmart footprint delivers 409 million of  
19 4-wall EBITDA."  
20 Q. In 2019?  
21 A. "In 2019."  
22 Q. You'll agree, sir, that 4-wall  
23 EBITDA does not include overhead expenses,  
24 does it?  
25 A. Again, I can't -- I can't state



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1  
2 their definition of how they calculated  
3 4-wall EBITDA.  
4 Q. Do you see anywhere on page 37 of  
5 the Transier declaration where there is a  
6 line item accounting for corporate  
7 overhead?  
8 A. I do not see a line item.  
9 Q. As a matter of math, if  
10 your 5 percent corporate overhead number  
11 held and it were applied to the 4-wall  
12 EBITDA number margin that Mr. Transier has  
13 referred to on page 37 of the Transier  
14 declaration, that math would be 6 percent  
15 minus 5 percent equals 1 percent, correct?  
16 A. That math is correct.  
17 Q. Thank you.  
18 A. Again, I can't talk to the  
19 definition of what expenses were included  
20 or not in their calculation.  
21 Q. Thank you.  
22 The last bullet point on page 4  
23 of your report, the last sub-bullet point,  
24 refers to the letters of credit.  
25 Do you see that? \$271.1 million

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1  
2 stand-alone Letter of Credit facility?  
3 A. I do.  
4 Q. Do you know how the letters of  
5 credit were treated in the February 11th  
6 sale transaction?  
7 A. I do not.  
8 Q. Do you know what underlying  
9 liabilities the letters of credit were  
10 supporting or are supporting?  
11 A. Potential workmen's comp.  
12 Q. Did you perform an analysis as to  
13 what those liabilities would be?  
14 MR. FOX: Objection to the form.  
15 What period of time are you talking  
16 about?  
17 BY MR. GENENDER:  
18 Q. You can answer.  
19 A. Well, I actually have the same  
20 question.  
21 Q. At any period of time.  
22 A. No, we did not.  
23 Q. So if I asked you whether you did  
24 it as of yesterday or as of October 15th or  
25 any time in between, the answer would be

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1  
2 the same, wouldn't it?  
3 A. Yes, it would.  
4 Q. That you didn't do one?  
5 A. Correct.  
6 Q. On page 5 of your report, under  
7 number one, section 1A, you claim  
8 Mr. Griffith erroneously excluded  
9 approximately \$64 million of credit card  
10 deposits in transit.  
11 Do you see that?  
12 A. I do.  
13 Q. Have you ever spoken with Brian  
14 Griffith?  
15 A. I have not.  
16 (Henrich Exhibit 8, Declaration  
17 of Brian J. Griffith In Support of the  
18 Debtors' Motion to Estimate Certain  
19 507(b) Claims for Reserve Purposes,  
20 marked for identification, as of this  
21 date.)  
22 BY MR. GENENDER:  
23 Q. I'm handing you what I've marked  
24 as Exhibit 8. Can you identify that as the  
25 declaration of Brian Griffith filed

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1  
2 May 26th, 2019, to which you refer on the  
3 fifth page of your report?  
4 (Document review.)  
5 Q. Do you recognize it?  
6 A. Yes, I do.  
7 Q. This is the declaration to which  
8 you refer on page 5 of your report?  
9 A. Yes.  
10 Q. And if you'll turn to the last  
11 page of the report, it says 11 of 11 and  
12 it's a 507(b) claim calculation heading.  
13 Do you see that?  
14 A. I do.  
15 Q. Do you see there is \$70 million  
16 of account receivables listed as of  
17 petition date?  
18 A. I do.  
19 Q. Do you know what those are?  
20 A. No. There was no explanation in  
21 the document that gave indication as to  
22 what they were.  
23 Q. So you don't know what they are,  
24 correct?  
25 A. Correct.



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1  
2 Q. If you can turn to Exhibit 5,  
3 which is the borrowing base certificate, of  
4 October 13, 2018, and you see there -- we  
5 talked about earlier, an entry for eligible  
6 credit card receivables in the amount  
7 54.8 million, correct?  
8 A. Correct.  
9 Q. Do you know that credit card  
10 receivables and credit card deposits in  
11 transit are synonymous? Are used  
12 synonymously?  
13 A. Do I know if they're used  
14 synonymously?  
15 Q. Yes, sir.  
16 A. No, I do not.  
17 Q. Could you see how your adjustment  
18 double counts by approximately \$10 million?  
19 MR. FOX: Objection to form.  
20 A. Would you take me through that,  
21 please?  
22 Q. I'm just asking, do you think you  
23 have any double counting in your  
24 adjustments?  
25 A. In our table 2A to our report?

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1  
2 Q. Well, or on page 5 of your  
3 report.  
4 A. No. Again, as aforementioned,  
5 there was no definition or explanation as  
6 to what Mr. Griffith utilized in his chart.  
7 We were unaware as to what he was referring  
8 to.  
9 Q. You're saying on section 1A, on  
10 the fifth page of your report, the credit  
11 cards deposit in transit of \$64,279,940  
12 should have been included in his analysis,  
13 correct?  
14 A. Correct.  
15 Q. But did you take into account  
16 that he actually included 70 million of  
17 account receivables book value?  
18 MR. FOX: Objection to form.  
19 A. Again, we noted that he included  
20 \$70 million, but there was no explanation  
21 as to what that was and it was a different  
22 number than what was reported by the debtor  
23 for credit card deposits in transit. So  
24 there was no way of affirming whether or  
25 not it was one in the same.

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1  
2 Q. And you would agree that the  
3 \$64.279 million number you say he should  
4 have included is approximately \$10 million  
5 more than the eligible credit card  
6 receivables reflected in the borrowing base  
7 certificate, Exhibit 5, correct?  
8 A. When comparing those two numbers,  
9 yes.  
10 Q. Thank you.  
11 On the sixth page of your report  
12 you assert that Mr. Griffith applies a,  
13 "deeply discounted liquidation basis with  
14 net recovery of 85 percent at cost."  
15 Do you see that?  
16 A. I do.  
17 Q. Do you disagree that 85 percent  
18 represents the fair market value of the  
19 collateral?  
20 A. I disagree.  
21 Q. Do you think it has ever  
22 represented the fair market value of the  
23 collateral?  
24 MR. FOX: Objection to form.  
25 What period of time?

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1  
2 MR. GENENDER: Ever.  
3 A. I have -- has it ever reflected  
4 the fair market value of the inventory? I  
5 have no basis to answer that question.  
6 Q. Have you reviewed the APA?  
7 A. I have not.  
8 Q. You do understand there is an  
9 APA?  
10 A. I do.  
11 Q. Do you understand that in the APA  
12 there was a requirement that ESL was to  
13 deliver at closing an amount of cash that  
14 was approximately \$1.48 billion for  
15 inventory, credit card accounts receivable,  
16 and pharmacy receivables?  
17 MR. FOX: Objection to form. And  
18 objection. There is no foundation.  
19 The document speaks for itself. If you  
20 want to ask him about the document, put  
21 the document in front of him.  
22 BY MR. GENENDER:  
23 Q. Can you answer my question?  
24 A. I under -- what I did understand  
25 was that there was a \$1.408 billion cash

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1  
2 payment as part of the currency to pay the  
3 \$5.2 billion sale price.  
4 It is not my understanding that  
5 that was attributed to any specific  
6 collateral.  
7 Q. Are you aware that in the APA the  
8 debtors were required to deliver an  
9 aggregate of \$1.657 billion in aggregate  
10 inventory, credit card accounts receivable,  
11 and pharmacy receivables?  
12 MR. FOX: Objection to form.  
13 BY MR. GENENDER:  
14 Q. Were you aware of that?  
15 MR. FOX: Objection to form. The  
16 document speaks for itself.  
17 A. I am aware of that.  
18 Q. To the extent you don't enjoy the  
19 next line of questioning, you can blame the  
20 guy to your left -- your right, I should  
21 say. My left; your right.  
22 (Henrich Exhibit 9, Asset  
23 Purchase Agreement dated as of 1/17/19  
24 by and among Transform Holdco LLC,  
25 Sears Holdings Corporation and its

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1  
2 subsidiaries party hereto, not  
3 Bates-stamped, marked for  
4 identification, as of this date.)  
5 BY MR. GENENDER:  
6 Q. I'm handing you what's been  
7 marked as Exhibit 9.  
8 Is it your testimony you've never  
9 seen the Asset Purchase Agreement dated as  
10 of January 17, 2019, before?  
11 A. Correct.  
12 Q. Do you have any basis -- let me  
13 try it this way.  
14 Do you have any basis to disagree  
15 that as a matter of math, the cash payment  
16 of \$1.408 billion under the APA, which is  
17 Exhibit 9, equates to 85 percent of the  
18 figure \$1.657 billion that the debtors were  
19 required to deliver in aggregate inventory,  
20 credit card accounts receivables, and  
21 pharmacy receivables?  
22 MR. FOX: Objection to form.  
23 There is absolutely no foundation for  
24 that, and the document speaks for  
25 itself. This witness says he has never

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1  
2 even seen this before.  
3 BY MR. GENENDER:  
4 Q. You can answer the question.  
5 A. Apologies, I don't recall the  
6 exact question.  
7 Q. That was the point of the speech.  
8 MR. FOX: No, actually it wasn't.  
9 MR. GENENDER: Yeah, it was.  
10 MR. FOX: It was because the  
11 question was objectionable in a variety  
12 of ways.  
13 MR. GENENDER: Just say objection  
14 without interrupting the flow of the  
15 deposition. We're going to be here all  
16 night if you do that. It's okay.  
17 MR. FOX: We can be here as long  
18 as you want to be.  
19 MR. GENENDER: Let's just object.  
20 Let's limit the speaking objections and  
21 let's have one person object.  
22 MR. FOX: That's all we have,  
23 Paul.  
24 MR. GENENDER: No, you've got  
25 multiple.

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1  
2 MR. PARADISE: I have not  
3 objected a single time on the record.  
4 MR. FOX: Paul, don't go there.  
5 MR. GENENDER: Well, I'm hearing  
6 multiple people.  
7 MR. FOX: Why don't we take a  
8 break.  
9 MR. GENENDER: No, actually I  
10 would like to finish the question that  
11 you interrupted.  
12 MR. FOX: There is no question  
13 pending.  
14 MR. GENENDER: There was. He  
15 asked me to repeat the question.  
16 MR. FOX: Okay.  
17 BY MR. GENENDER:  
18 Q. Page 51 of Exhibit 9. Tell me  
19 when you're there.  
20 A. I have turned to page 51.  
21 Q. All right. Do you see the  
22 reference to the cash payment of  
23 \$1.408 billion? \$1,408,450,000, do you see  
24 that reference in Section 3.1A?  
25 A. I do.

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1  
2 Q. Can you turn to page 102 of the  
3 document.  
4 (Witness complies.)  
5 Q. Do you see section 10.9?  
6 A. I do.  
7 Q. Do you see that there is  
8 reference there to an obligation on the  
9 part of the seller, the debtors, to deliver  
10 1.657 of acquired inventory, credit card  
11 receivables, and pharmacy receivables?  
12 MR. FOX: Objection to form.  
13 A. I do.  
14 Q. Thank you.  
15 As a matter of math, would you  
16 have any basis to disagree that  
17 1.408 billion divided by 1.657 billion is  
18 85 percent?  
19 MR. FOX: Objection to form.  
20 A. I haven't done the math. As a  
21 matter of math it seems approximately  
22 correct, but again, there is no attribution  
23 of the cash to any specific collateral  
24 that's to be transferred. Nor does that  
25 valuation inform what the value of the

Page 122

1  
2 collateral was as of the petition date.  
3 And I also --  
4 Q. So let me --  
5 MR. FOX: He's not done.  
6 A. It also ignores that there was a  
7 credit bid of 433 million specifically for  
8 the inventory, in addition to whatever cash  
9 payment which does not have any attribution  
10 to any specific collateral.  
11 MR. GENENDER: I'm going to  
12 object to everything after "as a matter  
13 of math it seems approximately  
14 correct." Everything after that is  
15 nonresponsive and I move to strike.  
16 BY MR. GENENDER:  
17 Q. So Mr. Henrich, here is my  
18 question: You've prepared your report in  
19 this case without reviewing the APA, which  
20 is Exhibit 9, correct?  
21 A. Correct.  
22 Q. And you've prepared your report  
23 without relying upon the valuation, implied  
24 or otherwise, of the inventory reflected in  
25 Exhibit 9, correct?

Page 123

1  
2 MR. FOX: Objection to form.  
3 There is absolutely no foundation for  
4 the question.  
5 A. There's no valuation of the  
6 collateral as of the petition date and the  
7 sale document four months later.  
8 Q. I didn't say there was a  
9 valuation as of the petition date.  
10 You're offering your opinions in  
11 this proceeding without considering any  
12 implied valuation of the inventory as of  
13 the sale date as may be determined from the  
14 Asset Purchase Agreement, which is  
15 Exhibit 9, correct?  
16 A. Correct.  
17 Q. Thank you.  
18 Now would you agree as a general  
19 proposition that inventory in Going-Concern  
20 stores would be more valuable and yield  
21 more of a return than inventory in  
22 going-out-of-business stores?  
23 A. I would agree with that.  
24 Q. Thank you.  
25 You understand that the stores

Page 124

1  
2 that were purchased in connection with the  
3 APA, when substantially all the assets were  
4 purchased, were stores that were not GOB  
5 stores?  
6 A. Correct. I agree with that.  
7 Q. They were Go-Forward stores?  
8 A. Yes.  
9 Q. The net recovery for inventory  
10 that you computed, whether it's  
11 96.4 percent or whether it might become  
12 95.6 percent does not include corporate  
13 overhead, correct?  
14 MR. FOX: Objection to form.  
15 A. Correct.  
16 Q. It doesn't include bankruptcy  
17 expenses or administrative claims, correct?  
18 A. You said "does it" and then you  
19 said "correct" so -- is there another  
20 question? I didn't quite understand.  
21 Q. You misheard and I appreciate the  
22 clarification.  
23 It doesn't, does not, include  
24 bankruptcy expenses or administrative  
25 claims, correct?

Page 125

1  
2 MR. FOX: Objection to form.  
3 A. Correct.  
4 Q. The sixth page of text of your  
5 report, sub letter C.  
6 A. May I put this to the side?  
7 Q. Sure.  
8 The third sentence, are you  
9 there?  
10 A. C.  
11 Q. Third sentence, it says, "The  
12 debtors reported actual net recovery for  
13 inventory of 96.4 percent cost."  
14 Do you see that?  
15 A. I do.  
16 Q. That's not something the debtors  
17 reported, did they?  
18 That is a reference to Exhibit 5  
19 to your report that we determined -- I  
20 think you said you understood was provided  
21 by ESL?  
22 A. Correct.  
23 Q. That same paragraph, going down,  
24 you have a sentence that starts, "In my  
25 opinion, based on the performance of the

Page 126

1  
2 262 GOB stores, it is reasonable to assume  
3 that if all remaining stores were  
4 liquidated in the same time frame as the  
5 262 stores, they would have achieved  
6 comparable results."  
7 Do you see that?  
8 A. I do.  
9 Q. Did I read that correctly?  
10 A. You did.  
11 Q. So how many additional stores are  
12 you referring to that would have been --  
13 that could have been liquidated in the same  
14 time frame as the 262 stores?  
15 A. I believe there were 425  
16 Go-Forward stores.  
17 Q. If there were approximately 700  
18 stores being liquidated instead of 262  
19 stores being liquidated, couldn't that have  
20 flooded the market and decreased the return  
21 on the inventory?  
22 MR. FOX: Objection to form.  
23 Q. Is that possible?  
24 A. I don't see it as flooding the  
25 market. It depends how you define the

Page 127

1  
2 market. Each individual store has its own  
3 market. It serves a density of population  
4 and a specific geographic reach area.  
5 So to the effect that you  
6 liquidated stores in California, that's not  
7 going to -- or elsewhere in the west,  
8 that's not going to affect the stores and  
9 the liquidation results in the east.  
10 I mean, there were 262 stores  
11 around the country that were -- which are  
12 obviously a considerable amount, that were  
13 liquidated and achieved the results of  
14 whether with it's 96.4 or 95.6.  
15 Q. Or those numbers less corporate  
16 overhead, administrative expenses, and  
17 bankruptcy expenses?  
18 MR. FOX: Objection to form.  
19 A. Yes.  
20 Q. You understand that the 262 GOB  
21 stores were actually -- those GOB sales  
22 happened in a staggered manner, correct?  
23 A. Yes.  
24 Q. It's possible that the return --  
25 the results could have been worse if more

Page 128

1  
2 stores were liquidated, correct? You don't  
3 know?  
4 MR. FOX: Objection to form.  
5 A. Anything is possible. The  
6 experience of the company was to achieve in  
7 the mid '90s and at all these different  
8 stages. I think it's also equally  
9 reasonable to assume that you would have  
10 comparable results.  
11 Q. Notwithstanding what ESL -- and  
12 you offer your conclusion where you say,  
13 "Accordingly, I have adjusted Griffith's  
14 analysis on Exhibit 3 with an add-back  
15 adjustment of \$306.8 million."  
16 Do you see that?  
17 A. I do.  
18 Q. And you did that without taking  
19 into effect what ESL paid for the inventory  
20 in the Go-Forward stores as reflected in  
21 the APA, correct?  
22 MR. FOX: Objection to form.  
23 A. Two disagreements with that.  
24 One, is I disagree with the  
25 premise that they paid 85 percent for the

Page 129

1  
2 inventory. Again, based on what we  
3 discussed before, the payment is not  
4 specifically attributable to the inventory,  
5 and even if it was, you should be adding  
6 the credit bid amount so it would be much  
7 higher than 85 percent.  
8 But beyond that, we actually --  
9 the calculation of the 306.8 is an  
10 adjustment based off of the 85 percent. So  
11 it was the difference between the 96.4 and  
12 the 85, multiplied by the inventory in  
13 those stores.  
14 Q. So you're taking the view that  
15 the difference between the 96.4 percent and  
16 the 85 percent is \$306.8 million?  
17 A. Again --  
18 Q. Is that what you're saying?  
19 A. Please repeat the question.  
20 Q. Are you saying the difference  
21 between 96.4 percent recovery on the  
22 inventory versus 85 percent recovery on the  
23 inventory is \$306.8 million?  
24 A. The 11 point -- the 11.4 percent  
25 times -- multiplied by Griffith's book

Page 130

1  
2 value of the inventory.  
3 Q. If all those inventory would be  
4 liquidated, additional inventory were to be  
5 liquidated, wouldn't there be additional  
6 expenses incurred associated with the same?  
7 A. Well, those recovery rates take  
8 into account the direct selling costs or  
9 the GOB expenses because the recovery rates  
10 are net of those expenses.  
11 Q. But they're not net of corporate  
12 overhead, correct?  
13 A. Correct.  
14 Q. They're not net of bankruptcy  
15 expenses, correct?  
16 A. Correct.  
17 Q. And they're not net of  
18 administrative claims, correct?  
19 A. Correct.  
20 Q. Could the 363 sale to ESL have  
21 been consummated without the debtors  
22 incurring bankruptcy or administrative  
23 expenses?  
24 MR. FOX: Objection to form.  
25 A. By definition, you wouldn't have

Page 131

1  
2 a 363 sale outside of the context of a  
3 bankruptcy, so therefore bankruptcy  
4 expenses would be incurred. It doesn't  
5 necessarily follow that all bankruptcy  
6 expenses are directly related to the  
7 collateral.  
8 Q. Could the Going-Concern sale have  
9 been consummated without the company  
10 incurring corporate overhead during the  
11 pendency of the sale?  
12 A. It would have incurred corporate  
13 overhead.  
14 Q. Thank you.  
15 You can see that corporate  
16 expenses have helped to preserve collateral  
17 value are a component of 506(c) surcharges,  
18 correct?  
19 MR. FOX: Objection to form.  
20 A. We can see that corporate  
21 overhead expenses are appropriate to  
22 consider when determining what the net  
23 value of the collateral is.  
24 Whether they're 506(c) expenses  
25 or not is a different issue.

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1  
2 Q. Page 4 of your report, under the  
3 first main bullet, second sentence.  
4 A. I'm sorry, what page?  
5 Q. Page 4.  
6 Under the first main bullet, do  
7 you see where you state, "Corporate  
8 expenses that help to preserve the  
9 collateral value are a component of 506(c)  
10 expenses"?  
11 A. Yep.  
12 Q. Do you stand by that statement?  
13 A. I do.  
14 Q. And you include \$206.7 million of  
15 506(c) expenses in your analysis, correct?  
16 A. Of corporate overhead and  
17 professional fees, right.  
18 Q. Which you view those as  
19 comprising 506(c) expenses, correct?  
20 A. Correct.  
21 Q. Thank you.  
22 You adopt the Tiger liquidation  
23 number of 3.1 percent of inventory costs to  
24 calculate liquidation expense of  
25 \$83.4 million; is that correct?



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1  
2 MR. FOX: Objection.  
3 A. Would you repeat the question  
4 please.  
5 Q. Let's look at your report.  
6 A. I think that was off. We applied  
7 the 3.1 percent.  
8 MR. FOX: Wait. There is no  
9 question.  
10 BY MR. GENENDER:  
11 Q. Go ahead. Continue -- were you  
12 answering my question?  
13 A. I asked you to repeat the  
14 question first, please.  
15 Q. Do you use a Tiger liquidation  
16 number of 3.1 percent of inventory costs?  
17 MR. FOX: Objection to form. For  
18 what purpose?  
19 BY MR. GENENDER:  
20 Q. Do you use a --  
21 A. Do we use it --  
22 Q. Yes. Is it in your report? Do  
23 you use it?  
24 A. Yes.  
25 Q. Show me in your report where you

Page 134

1  
2 refer to it, please.  
3 (Document review.)  
4 A. So it would be easiest to show  
5 you on Exhibit 2A.  
6 Q. Yes. Sure. I'm there.  
7 A. Okay. Where we derive corporate  
8 expense for the liquidated stores, the GOB  
9 stores?  
10 Q. Yes.  
11 A. The 20.2 million is derived by  
12 the 3.1 percent times the GOB liquidation  
13 inventory at cost. In this case that's the  
14 651.6 number.  
15 Q. Okay.  
16 (Document review.)  
17 Q. Have you done any analysis to  
18 determine the expenses incurred by the  
19 debtors net of GOB expenses and  
20 professional fees between December 2nd when  
21 ESL made its first bid and when the sale  
22 closed on February 11th, 2019?  
23 A. No.  
24 Q. Have you done an analysis of what  
25 the debtors spent between January 17th,

Page 135

1  
2 2019, the date of the APA, and February  
3 11th, the date when the sale closed net of  
4 GOB expenses and professional fees?  
5 A. No.  
6 Q. Do you have any understanding as  
7 to whether there are ordinary course  
8 provisions in the APA?  
9 MR. FOX: Objection to form.  
10 A. No.  
11 Q. Are you aware that as a condition  
12 precedent to the APA, the debtor was  
13 required to deliver a threshold amount of  
14 inventory, credit card receivables, and  
15 pharmacy receivables?  
16 MR. FOX: Objection to form. The  
17 document speaks for itself.  
18 A. Yes.  
19 Q. Do you have -- as you sit here  
20 today, do you have any basis to contest the  
21 reasonableness of expenses incurred by the  
22 debtors between February -- I'm sorry,  
23 between January 17th, 2019, and  
24 February 11th, 2019, net of GOB expenses  
25 and professional fees?

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1  
2 A. I haven't done an analysis. I  
3 haven't seen any documents. So as I sit  
4 here today, I don't have a basis to either  
5 affirm or contradict.  
6 Q. Let me ask you the same question.  
7 Instead of asking you whether they were  
8 reasonable, I'm going to ask you if they  
9 were net -- to dispute the necessity of  
10 those same expenses?  
11 MR. FOX: Objection.  
12 BY MR. GENENDER:  
13 Q. Any basis to refute the necessity  
14 of those expenses?  
15 MR. FOX: Objection to form.  
16 A. I would say is it reasonable to  
17 expect that in the context of a bankruptcy  
18 that there are expenses to be incurred?  
19 Yes.  
20 Can I opine on whether or not the  
21 amount actually expended or incurred was  
22 reasonable? I have no basis to gauge that.  
23 Q. Have you reviewed the debtors'  
24 filings from last Thursday, June 27th?  
25 A. Are you referring to the -- what



Page 137

1  
2 are you referring to go?  
3 Q. The filings in connection with  
4 the 507(b) motion. In particular have you  
5 reviewed the supplemental declaration of  
6 Mr. Griffith?  
7 A. I have reviewed the supplemental  
8 declaration.  
9 Q. Okay. Have you done any work in  
10 connection with responding to the  
11 supplemental declaration of Mr. Griffith?  
12 A. No.  
13 Q. Do you intend to?  
14 MR. FOX: Objection.  
15 A. I don't know whether I will or  
16 won't.  
17 Q. Is it your opinion the 2Ls were  
18 fully secured as of petition date?  
19 A. Yes.  
20 Q. And that opinion is based at  
21 least in part on the fact that there was  
22 \$116.2 million of cash available to the  
23 2Ls, correct?  
24 MR. FOX: Objection to form.  
25 A. That the 116 -- that's incorrect

Page 138

1  
2 the way it's stated.  
3 Q. That they would benefit from the  
4 fact that there were \$116.2 million cash  
5 available to the 1Ls?  
6 A. Correct.  
7 Q. And that the 2Ls will benefit of  
8 there being \$72.8 million of pharmacy  
9 scripts available, correct?  
10 A. Correct.  
11 Q. And that there would be  
12 \$14.9 million of pharmacy receivables  
13 available, correct?  
14 The numbers are from your  
15 schedule 2A. It's your testimony. I'm  
16 sorry, 14.5.  
17 A. I thought the number was slightly  
18 different. That's why I hesitated.  
19 Q. Absolutely. You should. It's  
20 your testimony and that's why I'm happy --  
21 it's 14.5, okay. Is that correct?  
22 A. Correct.  
23 Q. And it's based on using an  
24 inventory number that does not reflect  
25 subtracting ineligible inventory as

Page 139

1  
2 reflected in the borrowing base, correct?  
3 A. Correct.  
4 Q. And it's based on an assumption  
5 that the letters of credit are not drawn,  
6 correct?  
7 MR. FOX: Objection to form. You  
8 already asked these questions.  
9 A. Correct.  
10 Q. And does your opinion take into  
11 account the accrued interest to which the  
12 first lienholders would be entitled through  
13 the pendency of the case?  
14 A. It does not.  
15 Q. Have you done that calculation?  
16 A. I have not.  
17 Q. Are you aware that Mr. Griffith  
18 did that calculation?  
19 A. I recall that it was a line item  
20 or an element of his chart.  
21 Q. Of approximately \$34 million?  
22 Does that sound familiar?  
23 A. I don't recall whether it was 34  
24 or 31, but approximately.  
25 Q. Fair enough.

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1  
2 It is whatever he said in his  
3 declaration, right?  
4 MR. FOX: Objection.  
5 A. That's what he stated it was.  
6 Q. But that was the not something  
7 you included in your number, is it?  
8 A. It is not.  
9 Q. Why don't we take a short  
10 break -- or take a break.  
11 (Recess is taken.)  
12 BY MR. GENENDER:  
13 Q. I will pass the witness.  
14 MR. FOX: Does anybody else have  
15 any questions?  
16 MR. LIUBICIC: No questions.  
17 EXAMINATION BY  
18 MR. FOX:  
19 Q. I do. Very briefly.  
20 Mr. Henrich, let's take a look at  
21 Exhibits 2 and 3. Now you said that in  
22 order to calculate in Exhibit 2 the net  
23 recovery percentage of 96.4 percent, you  
24 divided the going-out-of-business sales  
25 number total at the bottom of the page by

Page 141

1  
2 the cost of goods -- the number at the  
3 bottom of the column "Cost of goods sold,"  
4 plus the "going-out-of-business expense"  
5 number at the bottom of that column,  
6 correct?  
7 MR. GENENDER: Objection to the  
8 form.  
9 BY MR. FOX:  
10 Q. Did I get that right?  
11 MR. GENENDER: Objection.  
12 Leading. And objection to form.  
13 A. Answer?  
14 Q. Well, yeah, go ahead. You can  
15 answer.  
16 MR. GENENDER: Same objections.  
17 A. The column headings are slightly  
18 different but your concept was accurate.  
19 What I described at the outset of  
20 the deposition or somewhere near the  
21 beginning is that the net recovery  
22 percentage is -- the calculation is the GOB  
23 sales total, as the numerator, divided by  
24 the sum of the total in the column "Goods  
25 available at cost," plus the total in the

Page 142

1  
2 column entitled: "Total GOB expenses."  
3 Q. And when you calculated those  
4 amounts in Exhibit 2, the net recovery  
5 percentage, in total, was what?  
6 MR. GENENDER: Objection.  
7 Leading. Misstates the evidence in a  
8 major -- he didn't calculate it. It's  
9 really bad.  
10 BY MR. FOX:  
11 Q. When you calculated it today.  
12 MR. GENENDER: Objection.  
13 Misstates the testimony. Leading.  
14 BY MR. FOX:  
15 Q. Mr. Henrich, did you calculate  
16 the net recovery percentage today of 96.4  
17 percent in your testimony?  
18 A. I don't recall whether I  
19 calculated it today, but I have calculated  
20 it previously and derived the 96.4.  
21 Q. Okay. Now looking at Exhibit 3  
22 and using -- doing the exact same  
23 calculation on Exhibit 3 using the totals  
24 for going-out-of-business sales, goods  
25 available at cost, and total GOB expenses,

Page 143

1  
2 using your calculator, please calculate the  
3 net recovery percentage for Exhibit 3 doing  
4 it the exact way you calculated it for  
5 Exhibit 2.  
6 MR. GENENDER: Objection.  
7 Misstates the testimony in a  
8 misleading -- intentionally misleading  
9 manner.  
10 BY MR. FOX:  
11 Q. Go ahead. You can --  
12 A. May I use a piece of paper also?  
13 Just to jot down the denominator. This is  
14 not an HP. So...  
15 (Witness calculating.)  
16 A. It actually equates to  
17 96.4 percent.  
18 Q. So when you calculate the net  
19 recovery percentage using the numbers on  
20 Exhibit 3 in the same way that the net  
21 recovery percentage was calculated on  
22 Exhibit 2, are you saying you get the exact  
23 same net recovery percentage on Exhibit 3  
24 as it is shown on Exhibit 2?  
25 MR. GENENDER: Objection.

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1  
2 Leading. Move to strike.  
3 A. When I calculated in the same  
4 manner, the net recovery percentage on  
5 Exhibit 3 as I did in Exhibit 2, I ended up  
6 with the same 96.4 percent net recovery,  
7 not the 95.6 percent that's depicted on the  
8 chart.  
9 MR. FOX: Thank you. I have  
10 nothing further.  
11 MR. FOX: Anything else, Counsel?  
12 MR. GENENDER: No.  
13 MR. FOX: You don't?  
14 (Continued on following page to  
15 include jurat.)  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Page 145

1  
2 MR. GENENDER: No, I don't.  
3 MR. FOX: Anybody else?  
4 Thank you.  
5 (Time noted: 3:26 p.m.)  
6  
7  
8  
9 WILLIAM H. HENRICH  
10  
11 Subscribed and sworn to before me  
12 this day of 2019.  
13  
14  
15  
16 - o0o -  
17  
18  
19  
20  
21  
22  
23  
24  
25

Page 146

1  
2 C E R T I F I C A T E  
3  
4 STATE OF NEW YORK )  
5 : ss.  
6 COUNTY OF WESTCHESTER )  
7  
8 I, ANNETTE ARLEQUIN, a Notary  
9 Public within and for the State of New  
10 York, do hereby certify:  
11 That WILLIAM H. HENRICH, whose  
12 deposition is hereinbefore set forth,  
13 was duly sworn by me, and that the  
14 transcript of such depositions is a  
15 true record of the testimony given by  
16 such witness.  
17 I further certify that I am not  
18 related to any of the parties to this  
19 action by blood or marriage; and that I  
20 am in no way interested in the outcome  
21 of this matter.  
22 IN WITNESS WHEREOF, I have hereunto  
23 set my h of July, 2019.  
24  
25 ANNETTE ARLEQUIN, CCR, RPR, CRR, RSA

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1  
2 I N D E X  
3  
4 WITNESS PAGE  
5  
6 WILLIAM H. HENRICH  
7 MR. GENENDER 7  
8 MR. FOX 140  
9  
10  
11 I N D E X O F E X H I B I T S  
12 DESCRIPTION PAGE  
13  
14 Henrich Exhibit 1, Exhibit J 11  
15 containing the Expert Report of  
16 William Henrich in Connection  
17 with Assessment of 507(b)  
18 Adequate Protection Claims  
19 Asserted by Wilmington Trust,  
20 National Association  
21  
22 Henrich Exhibit 2, Document 35  
23 entitled "GOB Store Performance  
24 (Post-Ch. 11 Bankruptcy Filing),  
25 Bates-stamped ESL\_507B\_00000001  
26  
27 Henrich Exhibit 3, Document 53  
28 entitled "GOB Store Performance  
29 (Post-Ch. 11 Bankruptcy Filing),  
30 Bates-stamped ESL\_507B\_00000001  
31  
32  
33  
34  
35

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1  
2 I N D E X O F E X H I B I T S(Cont'd.)  
3 DESCRIPTION PAGE  
4  
5 Henrich Exhibit 4, Tiger Asset 74  
6 Intelligent Report dated  
7 9/28/2018, Bates-stamped  
8 SEARS\_507B\_00001287 through 1344  
9  
10 Henrich Exhibit 5, Borrowing Base 76  
11 Certificate, beginning with  
12 Bates-stamp SEARS\_507B\_00001430  
13  
14 Henrich Exhibit 6, Document with 84  
15 Estimated Script Asset Value,  
16 beginning with Bates-stamp  
17 SEARS\_507B\_00001508  
18  
19 Henrich Exhibit 7, Declaration of 102  
20 William L. Transier  
21  
22 Henrich Exhibit 8, Declaration of 111  
23 Brian J. Griffith In Support of  
24 the Debtors' Motion to Estimate  
25 Certain 507(b) Claims for Reserve  
Purposes  
26  
27 Henrich Exhibit 9, Asset Purchase 117  
28 Agreement dated as of 1/17/19 by  
29 and among Transform Holdco LLC,  
30 Sears Holdings Corporation and  
31 its subsidiaries party hereto,  
not Bates-stamped

1  
2 ERRATA SHEET FOR THE TRANSCRIPT OF:  
3 CASE NAME: SEARS HOLDINGS  
4 DATE: JULY 2, 2019  
5 DEPONENT: WILLIAM H. HENRICH

6	Pg.	Ln.	Now Reads	Should Read	Reason
7	—	—	_____	_____	_____
8	—	—	_____	_____	_____
9	—	—	_____	_____	_____
10	—	—	_____	_____	_____
11	—	—	_____	_____	_____
12	—	—	_____	_____	_____
13	—	—	_____	_____	_____
14	—	—	_____	_____	_____
15	—	—	_____	_____	_____
16	—	—	_____	_____	_____

17  
18  
19 WILLIAM H. HENRICH  
20 SUBSCRIBED AND SWORN BEFORE ME  
21 THIS \_\_\_ DAY OF \_\_\_\_\_ 2019.

22  
23  
24 (Notary Public)  
25 MY COMMISSION EXPIRES: \_\_\_\_\_

# Exhibit 99

**In The Matter Of:**

*In Re Sears*

*Holdings*

---

*Marti Murray*

*July 3, 2019*

*Highly Confidential*

---





Page 1

1  
2 UNITED STATES BANKRUPTCY COURT  
3 FOR THE DISTRICT OF NEW YORK  
4  
5  
6 In Re:  
7 SEARS HOLDINGS CORPORATION, et al.,  
8 Debtors.  
9 \_\_\_\_\_/  
10 \* H I G H L Y C O N F I D E N T I A L \*  
11 DEPOSITION OF MARTI P. MURRAY  
12 New York, New York  
13 Wednesday, July 3, 2019  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23 Reported by:  
24 ANNETTE ARLEQUIN, CCR, RPR, CRR, CLR  
25 JOB NO. 2019-73082

Page 2

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5  
6 July 3 2019  
7 12:09 p.m.  
8  
9 HIGHLY CONFIDENTIAL deposition of  
10 MARTI P. MURRAY, held at the offices of  
11 WEIL GOTSHAL & MANGES, LLP, 767 Fifth  
12 Avenue, New York, New York, pursuant to  
13 Notice, before Annette Arlequin, a  
14 Certified Court Reporter, a Registered  
15 Professional Reporter, a Certified  
16 Realtime Reporter, and a Realtime  
17 Systems Administrator and a Notary  
18 Public of the State of New York and New  
19 Jersey.  
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Page 3

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2 A P P E A R A N C E S:  
3  
4 AKIN GUMP STRAUSS HAUER & FELD, LLP  
5 Counsel for Unsecured Creditors  
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7 Bank of America Tower  
8 New York, New York 10036  
9 BY: PATRICK J. GLACKIN, ESQ.  
10 Pglackin@akingump.com  
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12 WEIL GOTSHAL & MANGES, LLP  
13 Counsel for Debtors and  
14 Debtors-in-Possession: Sears Holdings  
15 Corporation, et al.,:  
16 200 Crescent Court - Suite 300  
17 Dallas, Texas 75201-6950  
18 BY: PAUL GENENDER, ESQ.  
19 Paul.genender@weil.com  
20  
21  
22  
23  
24  
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Page 4

1  
2 A P P E A R A N C E S(Cont'd.):  
3  
4 CLEARY GOTTLIEB STEEN & HAMILTON, LLP  
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7 New York, New York 10006  
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11 MILBANK  
12 Counsel for Cyrus Capital  
13 2029 Century Park East, 33rd Floor  
14 Los Angeles, California 90067-3019  
15 BY: ROBERT J. LIUBICIC, ESQ.  
16 Rliubicic@milbank.com  
17 BY: SAM PAYNE, ESQ.  
18 Spayne@milbank.com  
19 BY: TOM KRELLER, ESQ.  
20 Tkreller@milbank.com - (Teleconference)  
21 BY: ERIC REIMER, ESQ.  
22 Ereimer@milbank.com - (Teleconference)  
23  
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Page 5

1  
2 A P P E A R A N C E S(Cont'd.):  
3  
4 SEYFARTH SHAW  
5 Counsel for Wilmington Trust, National  
6 Association, as Indenture Trustee and  
7 Collateral Agent  
8 New York Times Building  
9 620 Eighth Avenue  
10 New York, New York 10018-1405  
11 BY: STEVEN PARADISE, ESQ.  
12 Sparadise@seyfarth.com  
13  
14  
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Page 6

1  
2 M A R T I P. M U R R A Y, called as a  
3 witness, having been duly sworn  
4 by a Notary Public, was examined  
5 and testified as follows:  
6 THE WITNESS: I do.  
7 Marti P. Murray.  
8 BY MR. GENENDER:  
9 Q. Ms. Murray, you understand you  
10 are under oath?  
11 A. I do.  
12 Q. Have you given depositions  
13 before?  
14 A. I have.  
15 Q. On a number of occasions?  
16 A. Yes.  
17 Q. And are you full-time now a  
18 consultant in connection with restructuring  
19 matters?  
20 A. I am principal with The Brattle  
21 Group.  
22 Q. What do you do as a principal in  
23 The Brattle Group?  
24 A. I lead teams of professionals on  
25 various engagements that The Brattle Group

Page 7

1  
2 has.  
3 Q. What kinds of engagements?  
4 A. They can be consulting or  
5 testifying expert witness engagements or  
6 other types of financial advisory  
7 engagements.  
8 Q. In what areas?  
9 A. My areas of specialization are  
10 valuation, solvency, fraudulent conveyance,  
11 bankruptcy restructuring matters,  
12 distressed debt investing, private equity,  
13 and hedge funds primarily.  
14 I'd also like to just state for  
15 the record that I have some hearing loss,  
16 and I am wearing hearing aids today, but I  
17 may ask you to repeat a question if it's  
18 not coming through clearly.  
19 Q. Terrific. Thank you for raising  
20 that. And I'm actually just going to go  
21 into some ground rules that are probably  
22 things that you are familiar with, given  
23 that you've been deposed a number of times,  
24 but I think are worth stating.  
25 As you just said, if you don't

Page 8

1  
2 hear a question, let me know, okay?  
3 A. I will.  
4 Q. And I will try to keep my voice  
5 up, okay?  
6 A. Thank you.  
7 Q. If you don't understand a  
8 question that I ask you, will you let me  
9 know?  
10 A. Yes.  
11 Q. If you don't let me know, am I  
12 safe to assume that you have both heard and  
13 understood my question?  
14 A. Okay.  
15 Q. Is that fair?  
16 A. Yes.  
17 Q. Okay. What did you do to prepare  
18 for today's deposition?  
19 A. I reviewed a number of documents.  
20 Q. Do you recall which ones you  
21 reviewed?  
22 A. I reviewed my report, among other  
23 things.  
24 Q. Okay. What are the other things?  
25 A. I reviewed -- among other things,

Page 9

1  
2 I reviewed the Tiger appraisal.  
3 I reviewed Mr. Griffith's  
4 declaration.  
5 I reviewed other documents as  
6 well.  
7 Q. Do you recall what other  
8 documents you reviewed besides the ones you  
9 just enumerated?  
10 MR. LIUBICIC: I'll let you  
11 answer that if you reviewed other  
12 documents outside the presence of  
13 counsel.  
14 THE WITNESS: Outside of?  
15 MR. LIUBICIC: Outside of  
16 presence of documents. If you reviewed  
17 other documents on your own.  
18 A. I reviewed portions of the Shulte  
19 and Henrich expert reports.  
20 Q. Did you meet with counsel to  
21 prepare for the deposition?  
22 A. Yes.  
23 Q. And when did you meet with  
24 counsel to prepare for the deposition?  
25 A. I met with counsel in person on

Page 10

1  
2 July 1st.  
3 Q. Monday of this week?  
4 A. Yes.  
5 Q. And how long did you meet?  
6 A. The day.  
7 Q. The whole day?  
8 A. Yes. Normal workday.  
9 Q. Okay. So eight hours?  
10 A. Approximately, yes.  
11 Q. Who was present?  
12 A. Mr. Liubicic, Mr. Payne were  
13 present in person. There were a Milbank  
14 lawyer named Yelena. There was another  
15 Milbank lawyer who was present for part of  
16 the time. And then there were two Milbank  
17 attorneys that were present from time to  
18 time telephonically.  
19 Q. Okay. Did you meet with your  
20 lawyers other than on July 1st to prepare  
21 for today's deposition?  
22 A. Telephonically.  
23 Q. And when did you do that?  
24 A. I believe it was last Friday.  
25 Q. Okay. And how long did that

Page 11

1  
2 take?  
3 A. A few hours.  
4 Q. And were you in the room with  
5 anybody, any of the lawyers, or were you on  
6 the phone?  
7 A. I was not in the room with the  
8 lawyers.  
9 Q. Okay. When you met with the  
10 lawyers on July 1st, did you review any  
11 documents that refreshed your recollection?  
12 A. Yes.  
13 Q. Which ones?  
14 A. My report, among others.  
15 Q. What are the other ones you  
16 remember, if they're different than the  
17 ones that you have already identified.  
18 A. I can't remember specifically.  
19 Q. When was the first time you saw  
20 Mr. Schulte's report?  
21 A. After it was filed.  
22 Q. When was the first time you saw  
23 Mr. Henrich's report?  
24 A. After it was filed.  
25 Q. Have you spoken to Mr. Schulte in

Page 12

1  
2 connection with this case?  
3 A. No.  
4 Q. Have you spoken with Mr. Henrich  
5 in connection with this case?  
6 A. No.  
7 Q. Do you know Mr. Schulte?  
8 A. No.  
9 Q. Do you know Mr. Henrich?  
10 A. I know who he is. I don't  
11 believe I've ever actually met him in  
12 person.  
13 Q. When did your work in connection  
14 with this case commence?  
15 A. In May.  
16 Q. Do you recall when in May?  
17 A. Mid May.  
18 Q. Are there other people at your  
19 firm working on this engagement?  
20 A. Yes.  
21 Q. Who?  
22 A. Primarily Julia Zhu and Monish  
23 Zaveri.  
24 Q. How much time have you spent on  
25 this engagement?

Page 13

1  
2 A. Me personally?  
3 Q. Yes.  
4 A. Over 200 hours.  
5 Q. Do you know how much time your  
6 colleagues have spent?  
7 A. In total?  
8 Q. Sure.  
9 A. In total, we have spent in excess  
10 of 750 hours.  
11 Q. Since the middle of May?  
12 A. Correct.  
13 Q. Is that between the three of you?  
14 A. There are other Brattle  
15 professionals who are involved in the  
16 engagement, but Julia and Monish are the  
17 primary Brattle professionals.  
18 Q. Okay. Have you testified in  
19 court before?  
20 A. I have.  
21 Q. In bankruptcy court?  
22 A. Yes.  
23 Q. On how many occasions?  
24 A. In bankruptcy court?  
25 Q. Yes.

Page 14

1  
2 A. Twice.  
3 Q. Which cases?  
4 A. SW Boston.  
5 Q. Okay.  
6 A. And GSC.  
7 Q. Which court was SW Boston?  
8 A. Boston bankruptcy court.  
9 Q. Do you know who the judge was?  
10 A. Judge Feeney.  
11 Q. F-e-e-n-e-y?  
12 A. I believe that's correct.  
13 Q. What about GSC?  
14 A. Judge Chapman.  
15 Q. Where? Which court?  
16 A. Which court?  
17 Q. Yes.  
18 A. Southern -- in New York.  
19 Q. Okay. What did you testify on in  
20 SW Boston? What was the subject matter of  
21 your testimony?  
22 A. The subject matter involved the  
23 claim of a secured creditor, including  
24 calculation of post-petition interest due,  
25 diminution in value of the secured

Page 15

1  
2 creditor's collateral, and the appropriate  
3 rate of interest for a post-emergence debt  
4 security.  
5 Q. Did you offer 507(b) testimony in  
6 SW Boston?  
7 A. I offered an opinion about the  
8 diminution in value claim.  
9 Q. Okay. And what was the opinion?  
10 That there was a diminution in value?  
11 A. Yes.  
12 Q. Who was your client this that  
13 matter?  
14 A. Prudential.  
15 Q. Did you offer testimony in  
16 connection with 506(c) in the SW Boston  
17 case?  
18 A. I did not.  
19 Q. Have you ever -- prior to this  
20 case, have you ever offered an opinion on  
21 Section 506(c)?  
22 A. No.  
23 Q. What was the nature of your --  
24 and did you prepare a report in SW Boston?  
25 A. I did.

Page 16

1  
2 Q. Was it filed?  
3 A. Yes.  
4 Q. And you testified live at a  
5 hearing?  
6 A. I'm sorry?  
7 Q. And you testified live at a  
8 hearing?  
9 A. I did.  
10 Q. Do you recall when the hearing  
11 was?  
12 A. I believe it was in 2011 or 2012,  
13 that time frame.  
14 Q. And who were the lawyers  
15 representing Prudential that presented you?  
16 A. Goodwin Procter.  
17 Q. Do you recall who the lead lawyer  
18 was?  
19 A. Emanuel Grillo.  
20 Q. GSC, what your testimony in that  
21 matter?  
22 A. The testimony had to do with --  
23 it covered a few areas. One was industry  
24 custom and practice for fee rates that are  
25 charged to manage a variety of investment

Page 17

1  
2 products. It also had to do with 363 asset  
3 sales.  
4 Q. What in particular did it have to  
5 deal with 363 asset sales?  
6 A. This was a while ago, so I'm  
7 speaking about this to the best of my  
8 recollection.  
9 Q. Understood.  
10 A. The issue had to do in part with  
11 the rate that the -- the person who would  
12 credit bid their debt to get ownership of  
13 GSC, which was a money management firm, had  
14 stepped into the shoes of GSC as the  
15 manager, and there were issues around  
16 consents that the investment clients were  
17 required to give for that transaction and  
18 how that all played into the 363 sale.  
19 Q. Okay. Did any aspect of your  
20 testimony in GSC have to do with 507(b),  
21 diminution in value of secured collateral?  
22 A. I don't recall that.  
23 Q. Okay. Have you ever, aside from  
24 SW Boston and this engagement, have you  
25 provided expert opinions on 507(b)

Page 18

1  
2 diminution in value matters before?  
3 A. No, not as an expert.  
4 Q. So this is your second time  
5 offering a diminution value opinion under  
6 507(b)?  
7 A. Correct.  
8 Q. And you said not as an expert?  
9 A. Yes.  
10 Q. Have you offered opinions as a  
11 fact witness on 507(b) before?  
12 A. I have been involved as an  
13 investor in cases where diminution in value  
14 was an issue. And I have written articles  
15 about diminution in value.  
16 (Murray Exhibit 1, Expert Report  
17 of Marti P. Murray dated 6/18/19,  
18 marked for identification, as of this  
19 date.)  
20 BY MR. GENENDER:  
21 Q. I hand you what's been marked as  
22 Exhibit 1 to your deposition.  
23 I ask you to identify that as a  
24 true and correct copy of your report in  
25 this matter.

Page 19

1  
2 A. Yes, it appears to be my report.  
3 Q. Does your report include a  
4 complete copy of your CV?  
5 Does it has a complete listing of  
6 your credentials and your background, to  
7 your knowledge?  
8 A. Yes.  
9 Q. Does it have a complete listing  
10 of your materials you've written?  
11 A. Materials I've written?  
12 Q. Yes.  
13 (Document review.)  
14 A. Yes.  
15 Q. Thank you.  
16 You're making your deposition  
17 shorter by answering those questions that  
18 way.  
19 I understand there was an updated  
20 list of materials reviewed. So that might  
21 be the only change that I'm aware of in  
22 your report from what's in front of you as  
23 Exhibit 1; is that correct?  
24 A. What are you referring to is the  
25 only change?

Page 20

1  
2 Q. A listing of materials you  
3 reviewed. There was a -- I received a -- I  
4 saw an amended list of that yesterday?  
5 MR. LIUBICIC: Correct.  
6 A. Yes.  
7 Q. Is that the only change?  
8 A. Yes.  
9 Q. So if I had that list from your  
10 lawyer and put that with this report,  
11 that's your entire report?  
12 A. Yes.  
13 Q. Okay. But that changing of  
14 listing of things you have reviewed,  
15 doesn't change any of your opinions in this  
16 case; is that correct?  
17 A. Correct.  
18 Q. Are all of your opinions  
19 contained in Exhibit 1 that you intend to  
20 offer in this case?  
21 A. Yes, with a qualification that  
22 things may come up that I may discuss with  
23 counsel that may cause me to seek to modify  
24 or supplement my report.  
25 Q. Understood.

Page 21

1  
2 As you sit here today, does  
3 Exhibit 1 contain all the opinions that you  
4 are offering in this case?  
5 A. As of today, yes.  
6 Q. Do you have any current plans to  
7 change any of your opinions or to offer any  
8 additional opinions?  
9 A. I don't have any plans as I sit  
10 here today, but based on discussions with  
11 counsel, I may seek to supplement or amend  
12 the report.  
13 Q. Okay. I understand that.  
14 I'm just asking you, as you sit  
15 here today, do you have any plans to do  
16 that, if you're intending to do that?  
17 A. No, I don't have any plans as I  
18 sit here today.  
19 Q. Thank you.  
20 Have you spoken with anyone at  
21 Cyrus in connection with your work in this  
22 case?  
23 A. Yes.  
24 Q. Who have you spoken with?  
25 A. I have spoken with Svet Nikov.

Page 22

1  
2 Q. About what?  
3 A. About being engaged in the case.  
4 Q. What else?  
5 A. I can't recall specifically what  
6 else I discussed with Svet.  
7 Q. Who engaged you in this matter?  
8 A. I was engaged by Milbank.  
9 Q. And who at Milbank was your  
10 contact?  
11 A. Rob Liubicic primarily, Tom  
12 Kreller and Eric Reimer.  
13 Q. Have you worked with them before?  
14 A. I have not.  
15 Q. Okay. Do you know how they got  
16 your name?  
17 A. I do not.  
18 Q. Did you ask them?  
19 A. No.  
20 Q. Are you curious?  
21 A. I spoke with Svet first, so I  
22 don't know how they got my name.  
23 Q. Is Svet someone you've known for  
24 a long time?  
25 A. No.

Page 23

1  
2 Q. Okay. Who was the first person  
3 to contact you in connection with this  
4 engagement?  
5 A. Svet.  
6 Q. And do you know how he found  
7 your -- how he came to contact you?  
8 A. A colleague at Cyrus.  
9 Q. Who is that colleague?  
10 A. Samir Grewal.  
11 Q. Say the last name again.  
12 A. G-r-e-w a-l.  
13 Q. Okay. Is that someone you know?  
14 A. I do.  
15 Q. And what in what context do you  
16 know Samir Grewal?  
17 A. I worked with Samir in an  
18 unrelated matter.  
19 Q. What matter was that?  
20 A. It's not in the public domain.  
21 Q. Okay. It's something you don't  
22 think you're allowed to talk about?  
23 A. I would be uncomfortable  
24 disclosing it? It's a matter that is  
25 unrelated to Sears.

Page 24

1  
2 Q. Okay. How long have you known  
3 Mr. Grewal?  
4 A. A few months.  
5 Q. Okay. So just since earlier this  
6 year?  
7 A. Yes.  
8 Q. Is your other engagement with  
9 Mr. Grewal still ongoing?  
10 A. It's not active at this time.  
11 Q. Is it a restructuring matter?  
12 A. It is.  
13 Q. Is it involving a filed case?  
14 A. Yes.  
15 Q. Has your retention been approved  
16 by a court?  
17 A. I'm not aware that it has been  
18 approved by a court.  
19 Q. Who is representing Cyrus in that  
20 matter?  
21 A. Quinn Emanuel.  
22 Q. Who is the lawyer at Quinn  
23 Emanuel?  
24 A. Corey Worcester.  
25 Q. How do you spell Worcester?



<p>Page 25</p> <p>1 2 A. I believe it's W-o-r-c-e-s-t-e-r. 3 Q. Okay. Is it your understanding 4 that Mr. Grewal gave your name to 5 Mr. Nikov? 6 A. That's my understanding. 7 Q. Your other matter that you're 8 working on with Mr. Grewal, what's the -- 9 what's the general nature of your work in 10 that matter? 11 Did it involve 507(b) or 506(c)? 12 A. Just to clarify, it's not active 13 right now. 14 Q. Okay. 15 A. It's a valuation matter. 16 Q. Have you spoken with any of the 17 other second lienholders in this case? 18 A. No. 19 Q. Do you know who they are? 20 A. I know who one of them is. 21 Q. Which one? 22 A. ESL. 23 Q. Have you read the deposition 24 transcripts of Mr. Schulte and Mr. Henrich 25 in this case?</p>	<p>Page 27</p> <p>1 2 A. I did. 3 Q. Did you write it all yourself? 4 A. Yes. 5 Q. And did you have help from your 6 colleagues? 7 A. In what respect? 8 Q. In terms of drafting the language 9 of the report. 10 A. Minor grammatical corrections. 11 Q. So if you look at pages 1 through 12 44 of the text, that was primarily drafted 13 by you, correct? 14 A. Correct. 15 Q. When did you start drafting it? 16 A. I start drafting reports along 17 the way, so it's really hard to say. But 18 it would have been within, I would say, in 19 terms of doing an outline and that kind of 20 thing, I would have started doing that 21 contemporaneously when I was doing my other 22 work. 23 Q. Other work on this matter? 24 A. On this matter, correct. 25 Q. You've referenced that you</p>
<p>Page 26</p> <p>1 2 A. No. 3 Q. Do you have -- I'm just looking 4 for a "yes" or "no." 5 Do you have any understanding of 6 any matter to which either one of them 7 testified? 8 A. No. 9 Q. Do you hold any professional 10 licenses? 11 A. I'm a credentialed valuation 12 analyst. 13 Q. Do you believe you've done an 14 evaluation analysis in this case? 15 A. Yes. 16 MR. LIUBICIC: Object to form. 17 BY MR. GENENDER: 18 Q. Do you have any legal training? 19 A. No. 20 Q. Are you qualified to offer any 21 legal opinions? 22 A. No. 23 Q. In connection with Exhibit 1 to 24 your report, who prepared the text of the 25 report?</p>	<p>Page 28</p> <p>1 2 reviewed Mr. Griffith's declaration in 3 connection with preparing for today, 4 correct? 5 A. Correct. 6 Q. Was that his declaration from 7 May 26th, 2019, that was filed in 8 connection -- 9 MR. LIUBICIC: You want to put in 10 terms of the first one or the second 11 one? 12 BY MR. GENENDER: 13 Q. Yeah, the one that was in 14 connection with the filing by the debtors 15 in May. 16 A. I focused on the second 17 declaration. 18 Q. The one filed on June 27th? 19 A. The one that was filed a few days 20 ago. 21 Q. I'll represent to you it was 22 filed on June 27th. 23 Does Mr. Griffith's declaration 24 that was filed, his supplemental 25 declaration that was filed on June 27th,</p>

Page 29

1  
2 does it cause you to change any of your  
3 opinions that are set forth in Exhibit 1?  
4 A. No.  
5 Q. What did you focus on in that  
6 declaration?  
7 A. Would you like me to go through  
8 it?  
9 Q. No, I want you to go through what  
10 you focused on, if anything?  
11 A. I focused on the views he  
12 expressed in that declaration.  
13 Q. Which ones?  
14 A. There were a number of them.  
15 Q. Do you have any opinion -- do you  
16 have any opinions to offer in response to  
17 anything in Mr. Griffith's supplemental  
18 declaration?  
19 A. Yes.  
20 Q. What are they?  
21 A. I would like to have the  
22 declaration before me so I can go through  
23 it and give you my opinions.  
24 Q. But are they opinions other than  
25 what's in your Exhibit 1, your report?

Page 30

1  
2 A. No, they're responses to certain  
3 statements that he made in his declaration.  
4 Q. Have you memorialized any of  
5 those in writing?  
6 A. No.  
7 Q. Have you made any notes about  
8 any -- in connection with reviewing  
9 Mr. Griffith's supplemental declaration?  
10 A. I may have.  
11 Q. Well, I mean, it's only since  
12 last Thursday. I mean, do you know if you  
13 have?  
14 A. Not for certain, no.  
15 Q. If you make notes, would you make  
16 them on a piece of paper or on a computer  
17 or how do you do that?  
18 A. They would be on a piece of  
19 paper.  
20 Q. Have you reviewed Brandon  
21 Aebersold's declaration that was filed last  
22 week by the debtors?  
23 A. I looked at it, but I did not  
24 study it in great detail.  
25 Q. Did you review the attachments to

Page 31

1  
2 it?  
3 A. I don't recall.  
4 Q. Did you play any role in  
5 preparing any briefing filed by Cyrus in  
6 this proceeding, any of the legal briefs?  
7 A. No.  
8 Q. Have you reviewed any of them?  
9 A. No, not in any great detail.  
10 Q. But you had no input into the  
11 briefing?  
12 A. I had no verbal or written input  
13 into the briefing other than -- I mean, I  
14 submitted a report.  
15 Q. Yes.  
16 A. So to the extent that my report  
17 is noted in a briefing, then the report is  
18 noted in a briefing.  
19 But other than that, I did not --  
20 Q. Make any comments on the brief or  
21 otherwise?  
22 A. No.  
23 Q. Thank you.  
24 How many prior restructurings  
25 have you worked on as a consultant or an

Page 32

1  
2 expert, if you know?  
3 A. A number of them.  
4 Q. They're listed on pages 2 and 3  
5 of your report?  
6 A. Not all of them.  
7 Q. Are there any that you're not  
8 listing in paragraph 7 of your report?  
9 A. Yes.  
10 Q. Which ones?  
11 A. The ones that I feel are  
12 confidential.  
13 Q. Have you worked on any  
14 restructurings that were liquidations?  
15 A. As an expert?  
16 Q. Yes. Or a consultant.  
17 A. I believe Encol was a  
18 liquidation.  
19 Q. What was the nature of your work  
20 in the Kmart bankruptcy?  
21 A. I was an investor in Kmart. And  
22 I can't recall whether that was a Kmart  
23 bankruptcy or when it was just distressed.  
24 Q. So your report says, "I have  
25 worked on matters relating to numerous

Page 33

1  
 2 bankruptcy/insolvency proceedings including  
 3 but not limited to those of JSC Capital,  
 4 Encol, the Dolan Company, Fletcher  
 5 International and W Hotel and Residences."  
 6 Do you see that?  
 7 A. Yes.  
 8 Q. Have you worked as a consultant  
 9 or testified as an expert in any other  
 10 bankruptcy proceedings?  
 11 A. Yes.  
 12 Q. Which ones?  
 13 A. The ones that I have not  
 14 disclosed due to confidentiality concerns.  
 15 Q. Well, if it's a bankruptcy  
 16 proceeding, have you been retained through  
 17 a court-approved retention?  
 18 A. No. I've been retained as a  
 19 consulting expert.  
 20 Q. Okay. So these are the only  
 21 bankruptcy proceedings where you've been a  
 22 consultant or a testifying expert that,  
 23 where that retention is public.  
 24 Is that your testimony?  
 25 A. No, that's not true.

Page 34

1  
 2 Q. Okay. Which other ones have you  
 3 been retained on where your retention is  
 4 public and therefore not confidential?  
 5 A. The Petters bankruptcy.  
 6 Q. Where is that pending?  
 7 A. That is in Minnesota.  
 8 Q. What else?  
 9 A. What else?  
 10 Q. What other bankruptcies have you  
 11 been retained on where the retention is  
 12 public, where you've been retained as a  
 13 consultant or as an expert?  
 14 A. Where the retention is public? I  
 15 can't think of any others.  
 16 Q. So if you add the Petters  
 17 bankruptcy to the ones you listed, that is  
 18 a total of six bankruptcies, is that right,  
 19 where you served as a consultant or as an  
 20 expert?  
 21 A. I don't think that's right.  
 22 Q. Which ones am I missing?  
 23 A. I'm sorry?  
 24 Q. Which ones am I missing?  
 25 A. You're missing a confidential

Page 35

1  
 2 matter.  
 3 Q. But my question is of the ones  
 4 that are public.  
 5 A. I'm sorry. Okay.  
 6 Public -- you're asking me the  
 7 public ones?  
 8 Q. Yes.  
 9 A. Six.  
 10 Q. Thank you.  
 11 How many non-public ones are  
 12 there?  
 13 A. Three.  
 14 Q. Thank you.  
 15 Have you prepared any exhibits in  
 16 connection with any of your opinions that  
 17 are not contained in Exhibit 1?  
 18 A. No.  
 19 Q. Pages 5 through 8 of your report  
 20 contain a summary of your opinions; is that  
 21 right?  
 22 A. Yes.  
 23 Q. Page 6, item C, you state, "The  
 24 2L debt collateral value as of the filing  
 25 date should at a minimum be valued based on

Page 36

1  
 2 the amount that Sears, an insolvent  
 3 retailer considering an orderly liquidation  
 4 of its business, could reasonably have  
 5 obtained for the collateral through  
 6 companywide going-out-of-business sales."  
 7 Did I read that correctly?  
 8 A. Yes.  
 9 Q. Did you consider Sears to be an  
 10 insolvent retailer as of the filing date?  
 11 A. Yes.  
 12 Q. Above that in Section B, this is  
 13 under paragraph 18 again, you state, "The  
 14 bulk of the collateral available to the 2L  
 15 debt was inventory. The 2L debt collateral  
 16 also included cash, pharmacy prescription  
 17 lists, credit card receivables, and  
 18 pharmacy receivables."  
 19 Do you see that?  
 20 A. Yes.  
 21 Q. What is your basis for believing  
 22 that the 2L debt collateral, as you define  
 23 it there, included cash?  
 24 A. It's based on my review of the  
 25 governing documents and discussions with

1  
2 counsel.  
3 Q. Which governing documents?  
4 A. The governing documents for the  
5 2L debt.  
6 Q. Is it your view that the  
7 governing documents for the 2L debt  
8 indicate that cash is 2L debt collateral?  
9 A. Yes.  
10 Q. What is the basis for your  
11 statement that pharmacy prescription lists  
12 are 2L debt collateral?  
13 A. A review of the governing  
14 documents for the 2L debt and discussions  
15 with counsel.  
16 Q. What about for pharmacy  
17 receivables, what is your basis for  
18 believing that pharmacy receivables are 2L  
19 debt collateral?  
20 A. A review of the governing  
21 documents for the 2L debt and discussions  
22 with counsel.  
23 Q. Do you have a memory of seeing in  
24 any of the governing documents a reference  
25 that cash, pharmacy prescription lists,

1  
2 pharmacy receivables are 2L debt  
3 collateral?  
4 A. Yes.  
5 Q. You just flipped to a different  
6 page. What page did you flip to?  
7 A. I flipped to page 25.  
8 Q. And that's great. If you look at  
9 pages 24 and 25, I want to direct your  
10 attention to paragraph 64 through 66, okay?  
11 On page 24, paragraph 64 refers  
12 to collateral for the prepetition ABL debt.  
13 Do you see that?  
14 A. Yes.  
15 Q. Is that what is also called 1L  
16 debt?  
17 A. Yes.  
18 Q. Thank you.  
19 And you list -- you say, "The  
20 prepetition ABL facility was secured by a  
21 lien on the following categories of assets  
22 belonging to the grantors."  
23 Do you see that?  
24 A. Yes.  
25 Q. And you cite a Schedule 1 of a

1  
2 Third Amended and Restated Guaranty and  
3 Collateral Agreement from July 21, 2015,  
4 right?  
5 A. Right.  
6 Q. And you list a number of  
7 categories as 1L, as collateral for the 1L  
8 debt, correct?  
9 A. Correct.  
10 Q. Including pharmacy receivables?  
11 The last line of text on page 24.  
12 A. Yes.  
13 Q. And then on page 25, you list  
14 prescription lists?  
15 A. Yes.  
16 Q. Four items down. And then six  
17 items down, you list cash and cash  
18 equivalents, correct?  
19 A. Yes.  
20 Q. Okay. And then going to  
21 paragraph 65 you said, "The 2L debt was  
22 secured by a second lien after the  
23 prepetition ABL facility in the following  
24 categories of assets belonging to the  
25 grantors."

1  
2 Did I read that correctly?  
3 A. Yes.  
4 Q. And you list five different  
5 items, right?  
6 A. Yes.  
7 Q. And you cite an Amended and  
8 Restated Security Agreement, page 9, dated  
9 March 20, 2018, correct?  
10 A. Yes.  
11 Q. Those five items that you list as  
12 security for the second lien debt do not  
13 include prescription lists, do they?  
14 A. Yes, they do.  
15 Q. Where?  
16 A. Books and records relating to the  
17 collateral.  
18 Q. You're referring to the fourth  
19 item that says books and records related to  
20 the collateral, the lower C.  
21 What does that collateral refer  
22 to?  
23 A. Pharmacy-related collateral.  
24 Q. Where is that shown in paragraph  
25 65?

Page 41

1  
2 A. Inventory.  
3 Q. So you identify it... okay.  
4 What about cash and cash  
5 equivalents, where is that listed in  
6 paragraph 65?  
7 A. "Proceeds, insurance claims  
8 supporting obligation and products of any  
9 of the above."  
10 Q. Okay. And what about pharmacy  
11 receivables?  
12 A. "Proceeds, insurance claims  
13 supporting obligation and products of any  
14 of the above."  
15 Q. So why did you specifically  
16 enumerate pharmacy receivables,  
17 prescription lists, cash and cash  
18 equivalents under the 1L debt, but did not  
19 specifically enumerate them under the 2L  
20 debt?  
21 A. The governing documents for the  
22 1L debt and the 2L debt are not drafted the  
23 same. But just because they're not drafted  
24 the same does not mean that those  
25 components are not included in collateral

Page 42

1  
2 for the 2L debt.  
3 Q. And what is your basis for  
4 believing that those three components that  
5 I'm referring to -- pharmacy receivables,  
6 prescription lists, and cash and cash  
7 equivalents -- are actually included in the  
8 2L credit agreements?  
9 MR. LIUBICIC: Objection. Asked  
10 and answered.  
11 BY MR. GENENDER:  
12 Q. You can answer.  
13 A. It's the same answer that I gave  
14 before.  
15 Q. Are you saying -- is it your view  
16 that the amended and restated security  
17 agreement referenced in footnote 90 on page  
18 25 of your report specifically enumerates  
19 pharmacy receivables, prescription lists,  
20 and cash and cash equivalents as 2L -- as  
21 collateral for 2L debt?  
22 MR. LIUBICIC: Objection. Asked  
23 and answered.  
24 A. My conclusion about what the  
25 collateral for the 2L debt was, was based

Page 43

1  
2 on my review of the governing documents and  
3 discussions with counsel.  
4 Q. Were you told to assume that --  
5 were you told to assume that pharmacy  
6 receivables, prescription lists, and cash  
7 and cash equivalents were 2L collateral?  
8 (Document review.)  
9 A. I believe that I assumed that  
10 cash was a product of the sale of inventory  
11 and credit -- was a product of receivables  
12 and inventory. And I think that my  
13 conclusion about the components of the 2L  
14 collateral were based on my review of the  
15 governing documents and discussions with  
16 counsel.  
17 I don't recall being told to  
18 assume what the components were. I had  
19 discussions with counsel, and I did my own  
20 work.  
21 Q. If your conclusion that cash and  
22 cash equivalents, prescription lists, and  
23 pharmacy receivables are not 2L collateral,  
24 that would affect your opinions in this  
25 case, wouldn't it?

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1  
2 A. Yes.  
3 Q. Are you aware that, by way of  
4 example, Mr. Henrich testified that cash is  
5 not 2L collateral?  
6 A. I don't know what Mr. Henrich  
7 testified to.  
8 Q. You're not aware that he  
9 testified that cash is not 2L collateral?  
10 MR. PARADISE: Objection to the  
11 form.  
12 MR. LIUBICIC: Join.  
13 A. I'm aware of what he had -- what  
14 he said in his report, but I'm not aware to  
15 what he testified to.  
16 Q. Okay. Looking at paragraph 65  
17 and 66 on page 25 of your report, the last  
18 two items you enumerate under 1L collateral  
19 are -- refer to "all books and records  
20 pertaining to the collateral and all  
21 proceeds, insurance claims supporting  
22 obligations and products of any of the  
23 above."  
24 Do you see that?  
25 A. You're in paragraph 64?



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1  
2 Q. Yes.  
3 A. Yes.  
4 Q. Okay. And you have similar  
5 language in the last two of your enumerated  
6 items under 2L debt collateral.  
7 Do you see that?  
8 You say "books and records  
9 relating to the collateral."  
10 Do you see that?  
11 A. Yes.  
12 Q. And then you say "proceeds,  
13 insurance claims, supporting obligations  
14 and products of any of the above."  
15 Do you see that?  
16 A. Yes.  
17 Q. So you just testified that in  
18 your view, pharmacy receivables,  
19 prescription lists, and cash and cash  
20 equivalents fall under the last two items  
21 of 2L debt collateral that you list in  
22 paragraph 65.  
23 Is that your testimony?  
24 MR. LIUBICIC: Objection.  
25 Mischaracterizes testimony. Compound.

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1  
2 A. Maybe you can break it down --  
3 Q. You want me to break it down?  
4 A. -- by category.  
5 Q. You want me to break it down?  
6 A. Yes, please.  
7 Q. Did you testify that prescription  
8 lists are included in the last two items  
9 that you identify in paragraph 65?  
10 A. Yes.  
11 Q. Is it your view that cash and  
12 cash equivalents are included in those same  
13 two categories in paragraph 65?  
14 A. Yes.  
15 Q. And what about pharmacy  
16 receivables?  
17 A. Yes.  
18 Q. Do you think those three  
19 categories, pharmacy receivables,  
20 prescription lists, and cash and cash  
21 equivalents, are also included in the last  
22 two categories in paragraph 64?  
23 A. Can you repeat the question,  
24 please?  
25 Q. Do you think those three

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1  
2 categories, being pharmacy receivables,  
3 prescription lists, and cash and cash  
4 equivalents are also included in the last  
5 two categories you delineate in paragraph  
6 64?  
7 A. No, the language is drafted  
8 differently in the two different governing  
9 documents.  
10 Q. So is it your view -- but you're  
11 testifying that the 2L collateral governing  
12 documents specifically refer to credit  
13 card, accounts receivable, inventory and  
14 related documents and chattel paper? Is  
15 that what you're saying?  
16 A. I'm sorry, we're talking about  
17 the 2L debt now?  
18 Q. Yes.  
19 A. So what was your question?  
20 Q. Is it your testimony that the 2L  
21 Amended and Restated Security Agreement  
22 that you referred to in paragraph -- in  
23 footnote 90 specifically refers to credit  
24 cards, credit card accounts receivables?  
25 MR. LIUBICIC: Object to the

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1  
2 form.  
3 A. Yes.  
4 Q. Does it specifically refer to  
5 chattel paper?  
6 A. Yes.  
7 Q. Does it specifically use the  
8 word -- refer to prescription lists?  
9 MR. LIUBICIC: Object to form.  
10 A. It refers to books and records  
11 relating to the collateral.  
12 Q. That's not my question.  
13 Does it specifically refer to  
14 prescription lists?  
15 A. It does not have the word -- as I  
16 recall it, it does not have those words in  
17 the language.  
18 Q. Does it specifically refer to  
19 pharmacy receivables?  
20 A. No.  
21 Q. Does it specifically refer to  
22 cash and cash equivalents?  
23 A. It refers to proceeds and  
24 products of any of the above.  
25 Q. Does it specifically refer to



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1  
2 cash and cash equivalents?  
3 A. It does not -- as I recall, it  
4 does not use the words "cash and cash  
5 equivalents," but that doesn't mean it  
6 doesn't specifically refer to the proceeds  
7 from the sale of collateral.  
8 MR. GENENDER: I'm going to  
9 object to everything after "cash  
10 equivalents" as nonresponsive.  
11 Thank you.  
12 THE WITNESS: Could we take a  
13 short break?  
14 MR. GENENDER: Certainly.  
15 THE WITNESS: Thank you.  
16 (Recess is taken.)  
17 BY MR. GENENDER:  
18 Q. Ms. Murray, you understand that  
19 you're still under oath?  
20 A. I do.  
21 Q. Great.  
22 Your report refers to a  
23 declaration by Rob Riecker; is that right?  
24 A. Yes.  
25 Q. And you understand that's a

Page 50

1  
2 declaration that's not referenced in any of  
3 the debtors' papers in connection with  
4 507(b) or the 506(c) surcharge claim,  
5 correct?  
6 A. I'm not aware that I've seen the  
7 debtor referenced them, but I don't know  
8 that the debtor has not referenced them.  
9 Q. Okay. Are you aware that there  
10 were equity bids for the collateral at  
11 issue in this case -- for some of the  
12 collateral at issue in this case?  
13 A. Yes.  
14 Q. Do you know what percentage those  
15 equity bids were?  
16 A. I believe -- I have some general  
17 idea of the equity bids.  
18 Q. What is that?  
19 A. My understanding of the equity  
20 bids is that there was a percentage number  
21 that was guaranteed after which a fee was  
22 paid to the bidder, the equity bidder. And  
23 then after that, there was a sharing  
24 arrangement on proceeds in excess of the  
25 guaranteed amount and the fee amount.

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1  
2 Q. What did the percentage come out  
3 to, do you know?  
4 A. I can't recall the exact  
5 percentage. I think it's referenced  
6 somewhere in the report or in the Griffith  
7 declaration.  
8 Q. In the Griffith declaration, yes,  
9 but it's not referenced in -- the  
10 percentage isn't referenced in your report,  
11 is it?  
12 (Document review.)  
13 Q. Paragraph 18-J on page 7 of your  
14 report does not refer to the equity bid,  
15 does it?  
16 A. Let me look.  
17 Q. Please.  
18 A. 18-J refers to the Tiger  
19 appraisals.  
20 Q. It doesn't refer to the equity  
21 bids, does it?  
22 A. Which equity bids are you  
23 referring to?  
24 Q. The ones referred to in  
25 Mr. Griffith -- that Mr. Griffith refers

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1  
2 to.  
3 A. Okay. So let me look through my  
4 report.  
5 Q. Sure.  
6 (Document review.)  
7 A. They are referenced in my report.  
8 Q. Where are you looking?  
9 A. The first -- well, one of the  
10 references that I see is paragraph 57.  
11 Q. Okay. What else?  
12 (Document review.)  
13 A. I can't recall whether -- in  
14 paragraphs... let's see.  
15 (Document review.)  
16 A. In 85 and 86, I make reference to  
17 wind down analyses that were done in  
18 January of 2019. And I can't recall  
19 whether those wind down analyses also  
20 included reference to those equity bids.  
21 The debtor ultimately determined  
22 that the best way to maximize the value of  
23 the remaining inventory was to proceed on  
24 an advisory basis, including with Abacus to  
25 liquidate that inventory.

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1  
2 Q. For the GOB stores?  
3 A. For the GOB stores, but also for  
4 the purpose of doing the companywide  
5 orderly wind down business plan.  
6 Q. You understand that the  
7 company -- that substantially -- all or  
8 substantially all of the assets of Sears  
9 were sold in a going-concern sale that  
10 closed on February 11th, 2019, correct?  
11 A. Can you repeat that?  
12 Q. Have you reviewed the APA in this  
13 case?  
14 A. Are you asking me the first one  
15 or the second question?  
16 Q. I'm asking you that question.  
17 Have you reviewed the APA, the  
18 Asset Purchase Agreement?  
19 A. I recall that I looked at the  
20 APA.  
21 Q. Have you relied upon it in  
22 forming any of your opinions in this case?  
23 (Document review.)  
24 A. I refer to it in paragraph 58 of  
25 the report, and I talk about the assets

Page 54

1  
2 that were acquired by Transform.  
3 Q. That wasn't my question, though.  
4 My question is, have you relied  
5 upon the APA in forming any of your  
6 opinions in this case?  
7 A. Well, to the extent that my  
8 report is my opinion, then, I have relied  
9 on it. And it is footnoted in the report  
10 at footnote 81 and maybe at other places as  
11 well.  
12 Q. Would you agree that you valued  
13 the 2L collateral using an NOLV  
14 methodology?  
15 A. I present the value of the  
16 collateral using an NOLV methodology, as  
17 well as relying on management's valuation  
18 of the collateral as of the petition date.  
19 Q. That's the Riecker declaration  
20 that you referred to?  
21 A. The Riecker declaration and the  
22 supporting materials that we received.  
23 (Murray Exhibit 2, Tiger Asset  
24 Intelligent Sears Holdings Corporation  
25 Inventory Appraisal, Bates-stamped

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1  
2 SEARS\_507b\_00001287 through 1344,  
3 marked for identification, as of this  
4 date.)  
5 BY MR. GENENDER:  
6 Q. Let me hand you what's been  
7 marked as Exhibit 2.  
8 Do you recognize that as the  
9 Tiger appraisal effective as of an  
10 inventory date of October 6th, 2018?  
11 A. Yes.  
12 Q. That is a document that you  
13 relied upon in preparing your report?  
14 A. Yes.  
15 Q. You cite the Tiger appraisal in  
16 your report. On page 34, paragraph 91, you  
17 say, "The Tiger inventory appraisals cited  
18 Sears scripts as a potential source of  
19 value."  
20 Do you see that?  
21 A. Yes.  
22 Q. And this is under a section of  
23 your report where you're talking about the  
24 valuation of the 2L debt collateral as of  
25 the filing date.

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1  
2 That is the heading on page 27 of  
3 your report, correct?  
4 A. Correct.  
5 Q. Tiger inventory appraisals do not  
6 list Sears's scripts as second lien  
7 collateral, does it?  
8 A. I'm sorry, I missed the end of  
9 the question.  
10 Q. The Tiger appraisal, which is  
11 Exhibit 2, does not cite or list Sears's  
12 scripts as second lien collateral, does it?  
13 MR. LIUBICIC: Objection. Lack  
14 of foundation.  
15 A. The Tiger inventory appraisal  
16 doesn't, to my recollection, doesn't list  
17 anything as specifically second lien  
18 collateral.  
19 Q. Thank you.  
20 So to answer my question, the  
21 Tiger inventory appraisal does not list  
22 Sears's scripts as second lien collateral,  
23 does it?  
24 A. No --  
25 Q. Thank you.

1  
2 A. -- not specifically, because it  
3 doesn't list any second lien collateral  
4 specifically.  
5 MR. GENENDER: I'm going to  
6 object everything after "no" as  
7 nonresponsive and move to strike it.  
8 BY MR. GENENDER:  
9 Q. You cite the Tiger appraisal in  
10 paragraph 91 under "Sears's scripts."  
11 Do you see that?  
12 A. Yes.  
13 Q. And then you cite a different  
14 document to support that, in your view,  
15 "the debtors have represented that the  
16 value of the scripts as of the filing date  
17 is \$72.8 million based 140 stores and  
18 pharmacies."  
19 Do you see that?  
20 A. Yes.  
21 (Murray Exhibit 3, Document with  
22 Estimated Script Asset Value, not  
23 Bates-stamped, marked for  
24 identification, as of this date.)  
25 BY MR. GENENDER:

1  
2 Q. And you cite what I'm handing you  
3 as Exhibit 3, as support for that; is that  
4 right?  
5 (Document review.)  
6 A. Yes.  
7 Q. Is Exhibit 3 dated?  
8 A. No.  
9 Q. Does the Tiger appraisal report  
10 speak to the value of the scripts?  
11 MR. LIUBICIC: That was a  
12 question?  
13 MR. GENENDER: Yes.  
14 MR. LIUBICIC: Asked and  
15 answered.  
16 (Document review.)  
17 A. Can you repeat the question?  
18 Q. Does the Tiger appraisal report  
19 speak to the value of the scripts?  
20 A. As of what date?  
21 Q. As of any date.  
22 A. I don't think it really states to  
23 a value. I think it has an indicated  
24 metric.  
25 Q. What is that?

1  
2 A. The indicated metric in this  
3 report is \$5 a prescription, which they  
4 later updated in other reports to a  
5 significantly higher number.  
6 Q. I'm just asking about the report  
7 that is in front of you, Tiger report  
8 Exhibit 2 that you rely upon for your  
9 opinions, correct?  
10 A. Correct.  
11 Q. Do you rely upon any other Tiger  
12 appraisals in preparing your -- in offering  
13 your opinions in this case?  
14 A. Yes.  
15 Q. Okay. Which ones?  
16 A. They're cited in my report.  
17 Q. Can you identify any of them?  
18 A. There were four Tiger appraisals.  
19 Q. Well, actually, on -- under  
20 paragraph 91, you only cite Exhibit 2,  
21 correct?  
22 A. I cite Exhibit 2 --  
23 Q. Is that correct?  
24 A. In paragraph 91?  
25 Q. Yes.

1  
2 A. I cite Exhibit 2.  
3 Q. Thank you.  
4 Page 8 of Exhibit 2, the Tiger  
5 report says, "Based on an estimated return  
6 of \$5 per prescription, the script list  
7 would have a value of up to \$27 million."  
8 Do you see that?  
9 A. I do.  
10 Q. You don't cite that in paragraph  
11 91, do you?  
12 A. No.  
13 Q. Thank you.  
14 Paragraph 90, which has a heading  
15 "Cash balances as of the filing date," do  
16 you see that?  
17 A. Yes.  
18 Q. You don't cite any -- you don't  
19 footnote to anything to support the cash  
20 balances as of the filing date are second  
21 lien collateral; is that correct?  
22 A. In that particular paragraph?  
23 Q. Correct.  
24 A. No, that is addressed in another  
25 part of the report.

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1  
2 MR. GENENDER: Objection. I'm  
3 going to object to everything after the  
4 word "no" as nonresponsive and move to  
5 strike.  
6 BY MR. GENENDER:  
7 Q. As a matter of fact, in paragraph  
8 90, you say, "For purposes of my analysis,  
9 I have assumed that this cash reflects  
10 proceeds from the sale of inventory and the  
11 collection of receivables. As a result, I  
12 have included it in 2L debt collateral as  
13 of the filing date."  
14 Is that right?  
15 A. That's what it says.  
16 Q. That's what you say, right?  
17 A. That's what the report says.  
18 Q. And who wrote the report?  
19 A. I did.  
20 Q. Those are your words, right?  
21 A. Yes.  
22 Q. And you stand by those?  
23 A. I do.  
24 Q. If the cash balance as of the  
25 filing date reflected cash that arose from

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1  
2 the sale of unencumbered assets, would that  
3 change your opinion?  
4 A. Yes.  
5 Q. Do you know that it doesn't?  
6 A. I assumed that it was -- as I  
7 wrote in the report, I assumed that it was  
8 from inventory and receivables.  
9 Q. Can you answer my question?  
10 A. The question was?  
11 Q. Are you able to say with  
12 certainty what the source of any cash  
13 balances as of the filing date was?  
14 A. No.  
15 Q. Thank you.  
16 Paragraph 93, which references  
17 Sears pharmacy receivables, does not cite  
18 or footnote anything to support that  
19 pharmacy receivables are second lien  
20 collateral in that paragraph; is that  
21 correct?  
22 A. Correct.  
23 Q. Your last sentence states, "This  
24 is based on the likelihood that the  
25 eligible pharmacy receivables are

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1  
2 collectible, the 85 percent advance rate  
3 granted by the lenders against the pharmacy  
4 receivables, and the Lazard 507(b)  
5 analysis."  
6 Did I read that correctly?  
7 A. Yes.  
8 Q. Now looking at your report, pages  
9 38 and 39 have tables 5 and 6 on them,  
10 which calculate your two different  
11 scenarios for valuing the 2L debt; is that  
12 correct?  
13 A. The tables show the amount of  
14 funded debt as of the filing date, as of  
15 the effective date, and then shows the  
16 value of the collateral and subtracts out  
17 the 1L funded debt to determine what the  
18 value of the 2L debt collateral was as of  
19 the filing date.  
20 Q. Okay.  
21 A. And then adjusted for the credit  
22 bid and then takes that forward to  
23 determine the diminution in value claim.  
24 Q. And those tables 5 and 6 on pages  
25 38 and 39, do those correspond with

Page 64

1  
2 Appendix C-1 and C-2 on pages 65 and 68 in  
3 your report?  
4 A. Yes.  
5 Q. Would you agree that pages -- the  
6 appendices on pages 65 to 68 have more  
7 detail than the two tables in that they  
8 show the sources?  
9 MR. LIUBICIC: Object to the  
10 form.  
11 (Document review.)  
12 A. The Appendix C-1 and C-2 have  
13 notes to Appendix C-1 and C-2 attached  
14 which provides the sources.  
15 Q. Okay. Is it okay if we work off  
16 the Appendix C-1 and C-2 rather than tables  
17 5 and 6?  
18 A. Sure.  
19 Q. There is more information on  
20 Appendix C-1 and C-2, isn't there?  
21 A. Okay.  
22 Q. You agree? Because it lists out  
23 the sources, right?  
24 A. Yes.  
25 Q. Thank you.

Page 65

1  
2 So Appendix C-1, you calculate  
3 the total 1L funded debt as \$1.531 billion;  
4 is that correct?  
5 A. Correct.  
6 Q. That does not include any figure  
7 for letters of credit, does it?  
8 A. Correct.  
9 Q. And that figure, the letters of  
10 credit were \$395 million, correct?  
11 A. Approximately.  
12 Q. Yes.  
13 Did you do a calculation for 1L  
14 interest that they would be entitled to?  
15 A. What interest are you referring  
16 to?  
17 Q. Interest on the 1L debt through  
18 the pendency of the bankruptcy case.  
19 A. Prepetition?  
20 Q. No, postpetition.  
21 A. No, I did not include  
22 postpetition interest. It's not -- it is  
23 not a claim as of the filing date.  
24 Q. Okay.  
25 A. Valuations are done as of a

Page 66

1  
2 measurement date.  
3 Q. Okay.  
4 A. The measurement date is the  
5 filing date.  
6 Q. So your answer is no?  
7 A. No.  
8 Q. Thank you.  
9 MR. GENENDER: I'm going to  
10 object everything other than "no" as  
11 nonresponsive.  
12 BY MR. GENENDER:  
13 Q. I didn't ask you why, okay? Is  
14 that okay?  
15 MR. LIUBICIC: You don't need to  
16 agree with his objection.  
17 BY MR. GENENDER:  
18 Q. If you can just answer my  
19 question, that would be great, okay?  
20 MR. PARADISE: Paul, just to  
21 clarify, you said, "So your answer is  
22 no," and the witness said "no." I  
23 think she meant yes.  
24 MR. GENENDER: Well, it would be  
25 better if she just answered my

Page 67

1  
2 question.  
3 MR. PARADISE: I understood what  
4 you said. That is an obvious one. You  
5 said a negative question and she  
6 answered no. I think she meant yes.  
7 MR. GENENDER: Well, her  
8 testimony is what it is.  
9 BY MR. GENENDER:  
10 Q. Did you calculate any 1L in the  
11 interest to the first lienholders?  
12 A. No.  
13 Q. Thank you.  
14 If the letters of credit were  
15 included in your calculation for total 1L  
16 funded debt, that number would increase by  
17 \$395 million; is that correct?  
18 A. Correct.  
19 Q. You used, going down to  
20 collateral values, you used 2 million,  
21 391 -- strike that.  
22 You used \$2.3915 billion as  
23 inventory book value, correct?  
24 A. Correct.  
25 Q. And you got that from the

Page 68

1  
2 borrowing base certificate, right?  
3 A. Correct.  
4 Q. Let me take a step back.  
5 Did you compare any of your  
6 methodologies to the methodologies  
7 Mr. Schulte and Mr. Henrich used?  
8 A. I read their reports. I reviewed  
9 their reports. I understand the broad  
10 approach that they took. I didn't do a  
11 detailed comparative analysis.  
12 Q. Did you notice any differences in  
13 the way you did things versus the way they  
14 did things?  
15 A. Yes.  
16 (Murray Exhibit 4, Sears Holdings  
17 Corporation Borrowing Base Certificate  
18 as of October 13, 2018, not  
19 Bates-stamped, marked for  
20 identification, as of this date.)  
21 BY MR. GENENDER:  
22 Q. I've handed you what's been  
23 marked as Exhibit 4.  
24 Can you identify that as the  
25 borrowing base certificate that you



Page 69

1  
2 referred to in footnote 6 on page 66?  
3 Although it might have a different Bates  
4 number on it.  
5 A. It looks to be the borrowing base  
6 certificate.  
7 MR. LIUBICIC: I'm sorry, but  
8 what explains the different Bates  
9 number?  
10 MR. GENENDER: I think just  
11 produced by different parties. I think  
12 you produced it and I think Sears  
13 produced it.  
14 MR. LIUBICIC: Have you looked at  
15 that? Just make sure you agree with  
16 him that that's what you were citing in  
17 the report.  
18 MR. GENENDER: Yeah, I  
19 believe it --  
20 A. Yes, it would be better to  
21 have the exact document --  
22 MR. LIUBICIC: I don't doubt you.  
23 I just want --  
24 MR. GENENDER: It's the same one.  
25 A. It would be better to have the

Page 70

1  
2 exact document I cited because there's a  
3 lot of numbers on this page.  
4 Q. I'm going to direct you just to a  
5 couple of pages, okay?  
6 Let's just go to --  
7 A. Are you going to represent that  
8 this is the same borrowing base certificate  
9 that we cited?  
10 MR. LIUBICIC: I think he is.  
11 MR. GENENDER: I am. Absolutely  
12 I am. It's a fair question. It has a  
13 different tracking number on it. I  
14 think it was produced by a different  
15 party.  
16 BY MR. GENENDER:  
17 Q. Can you turn -- if you go into  
18 the document, if you will go in -- the  
19 fourth page?  
20 (Witness complies.)  
21 Q. In the upper left, it says --  
22 A. I'd really prefer to work off the  
23 exact document that we cited because this  
24 document has many pages --  
25 Q. Why don't we go off the record.

Page 71

1  
2 A. -- and I'm not sure it's the same  
3 document.  
4 MR. GENENDER: Can we go off the  
5 record?  
6 (Discussion off the record.)  
7 (Recess is taken.)  
8 BY MR. GENENDER:  
9 Q. Ms. Murray, you have Exhibit 4 in  
10 front of you, the borrowing base  
11 certificate?  
12 A. Yes.  
13 Q. And turn to the fourth page,  
14 including the cover page, where at the top  
15 left-hand side, it says, "inventory per  
16 stock ledger"?  
17 A. Yes.  
18 Q. And you've got Appendix C-1 from  
19 your report, page 65 in front of you as  
20 well?  
21 A. Yes.  
22 Q. All right. If you look at -- in  
23 the middle of your Appendix C-1, inventory  
24 book value, 2.3915 billion.  
25 Do you see that?

Page 72

1  
2 A. Yes.  
3 Q. You get that number from page 4  
4 of Exhibit 4, the borrowing base  
5 certificate, net eligible inventory \$2.3915  
6 billion; is that correct?  
7 A. Correct.  
8 Q. And then there is an NOLV 88.7  
9 percent percentage applied, correct?  
10 A. Correct.  
11 Q. And you use that number as well?  
12 A. Correct.  
13 Q. Okay. And the number that you  
14 start with 2.3915 billion has been adjusted  
15 as reflected on the borrowing base above  
16 that number, correct?  
17 A. Correct.  
18 Q. So it goes from total stock  
19 ledger inventory of 2.69 billion down to  
20 2.391 billion, correct?  
21 A. It's 2391.5.  
22 Q. Billion?  
23 A. 2.392 billion rounded.  
24 Q. Thank you.  
25 My question is, the number you



Page 73

1  
2 used \$2.3915 billion has been adjusted  
3 downward by approximately \$300 million per  
4 the borrowing certificate from what this  
5 total stock ledger inventory figure was,  
6 correct?  
7 A. Correct.  
8 Q. You start with the net eligible  
9 inventory number, correct?  
10 A. Correct.  
11 Q. And you think that's the  
12 appropriate place to start the analysis of  
13 the value of the inventory, correct?  
14 A. When I'm using 88.7 percent, it  
15 is appropriate.  
16 Q. Yes.  
17 A. Not necessarily for other  
18 methodologies that other people may apply.  
19 But in this case, when I'm using the 88.7  
20 percent, that is the right number to times  
21 by 88.7 percent.  
22 Q. Okay. Are you aware that other  
23 experts in this proceeding for the 2Ls have  
24 started with a number other than \$2.3915  
25 billion in value in the inventory? Have

Page 74

1  
2 you noticed that?  
3 A. I'm aware they used a different  
4 methodology --  
5 Q. Thank you.  
6 A. -- which may -- in which case it  
7 may be appropriate to start with another  
8 number.  
9 MR. GENENDER: I'm going to  
10 object to the entire answer as  
11 nonresponsive and move to strike.  
12 BY MR. GENENDER:  
13 Q. My question is, have you noticed  
14 that they started with a different number  
15 than you started with?  
16 A. And I can't really say because I  
17 don't have their reports in front of me to  
18 state what number they started with, but I  
19 am aware that they used a different  
20 methodology.  
21 Q. You take 2.3915 billion, multiply  
22 it by 88.7 percent, and come up with  
23 \$2.1213 billion for inventory value.  
24 Do you see that?  
25 A. I do.

Page 75

1  
2 This is in the minimum claim  
3 calculation, not in management's case.  
4 Q. Okay. I'm on Appendix C-1 --  
5 A. Correct.  
6 Q. -- to your report, page 65.  
7 Is that a "yes"?  
8 A. Yes.  
9 Q. Thank you.  
10 You understand that the 88.7  
11 percent number -- which also comes from the  
12 borrowing base certificate, right?  
13 A. Yes.  
14 Q. And per your footnote 7, is  
15 "derived from total company eligible  
16 inventory blended net liquidation value  
17 projected for October 6th, 2018, as per  
18 Tiger inventory appraisal at page 2."  
19 Do you see that?  
20 A. Yes.  
21 Q. And you understand that that  
22 Tiger inventory appraisal includes  
23 corporate overhead for a 12-week period of  
24 time?  
25 Do you understand that?

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1  
2 A. I understand that that appraisal  
3 is done on the basis of net orderly  
4 liquidation value, which would include all  
5 expenses required to achieve the net  
6 orderly liquidation value, including  
7 corporate overhead for the liquidation  
8 period.  
9 Q. And do you recall the liquidation  
10 period being 12 weeks?  
11 (Document review.)  
12 A. Page 5 of the Tiger appraisal  
13 report, they refer to the sale period and  
14 they show their sale period by banner for  
15 the projected sale term for a GOB sale of  
16 inventory. And the sale term is for Kmart,  
17 9.6 weeks; for Sears's full line, 11.1  
18 weeks; and for auto centers, 11 weeks.  
19 Q. So it would only includes  
20 corporate overhead for those periods of  
21 time, correct?  
22 (Document review.)  
23 A. Correct.  
24 Q. I want to skip down.  
25 You get lower in that section,

Page 77

1  
2 you then arrive at a total inventory value  
3 of \$2.1959 billion?  
4 Do you see that?  
5 A. Yes.  
6 Q. And then you make four  
7 adjustments to that, upward adjustments,  
8 correct?  
9 A. I wouldn't characterize those as  
10 "adjustments to that."  
11 Q. You add numbers to that to come  
12 up with your total 1L and 2L shared  
13 collateral value; is that right?  
14 A. Yes, that's right.  
15 Q. Cash, we talked about  
16 \$123.2 million, right? We talked about  
17 that?  
18 A. Yes.  
19 Q. Scripts, we talked about that  
20 came from Exhibit 3 that you testified to,  
21 the \$72.8 million number, correct?  
22 A. Correct.  
23 Q. The credit card receivable number  
24 comes from the borrowing base certificate,  
25 same page we're looking at, where it says,

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1  
2 eligible credit card receivables, right in  
3 the middle of the page, 54.8 million.  
4 Do you see that?  
5 A. Yes.  
6 Q. And then pharmacy receivables  
7 comes from the borrowing base certificate  
8 as well, 14.5 million that you adjusted  
9 down to 10.5 million per your report; is  
10 that correct?  
11 A. Yes. It's a net eligible  
12 pharmacy accounts receivable on the  
13 borrowing base.  
14 Q. Okay. You would agree with me  
15 the adjustments, the collective figures  
16 assigned to cash, scripts, and pharmacy  
17 receivables in Appendix C-1, page 65 of  
18 your report, add up to approximately \$205  
19 million; is that right?  
20 A. I'm sorry, which categories?  
21 Q. The three I just listed; cash,  
22 scripts, and pharmacy receivables.  
23 MR. LIUBICIC: And you said 205?  
24 MR. GENENDER: Approximately,  
25 205. Actually, 206.

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1  
2 A. 206-and-a-half, 207.  
3 Q. Okay.  
4 A. I'm not using a calculator here  
5 so...  
6 Q. I understand. I understand.  
7 So would you agree with me that  
8 if those three categories, cash, scripts  
9 and pharmacy receivables, were not  
10 appropriate 2L collateral, that the number  
11 would be -- that your number for total 1L  
12 and 2L shared collateral would be less by  
13 206 or 207 million dollars; is that right?  
14 MR. LIUBICIC: Objection. Lack  
15 of foundation.  
16 A. Can you repeat that?  
17 Q. Would you agree that if those  
18 three categories, being cash, scripts and  
19 pharmacy receivables, were not appropriate  
20 2L collateral, that your number for total  
21 1L and 2L shared collateral would be less  
22 by 206 or 207 million dollars?  
23 MR. LIUBICIC: Same objection.  
24 A. Well, it would still be 1L  
25 collateral.

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1  
2 Q. Okay.  
3 A. So it would still be available to  
4 satisfy the 1L which would then reduces the  
5 1L that is in front of the 2L.  
6 Q. Would it be 2L -- but you're  
7 assuming it's 2L collateral as well, right?  
8 A. I am assuming it's 2L collateral,  
9 but it would still be 1L collateral so, in  
10 essence, it's available for the 1L to  
11 reduce the amount of 1L that is before the  
12 2L.  
13 MR. GENENDER: I'm going to  
14 object to everything after "I'm  
15 assuming it's 2L collateral" as  
16 nonresponsive and move to strike it.  
17 BY MR. GENENDER:  
18 Q. My question was, you're assuming  
19 it's 2L collateral, right?  
20 MR. LIUBICIC: Objection. Asked  
21 and answered.  
22 A. What was the question? First you  
23 asked me if it was 1L --  
24 Q. There is no question -- I don't  
25 have a question. No question.

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1  
2 I just made an objection.  
3 Nonresponsive. There is no question on the  
4 floor.  
5 Your calculation for total 1L  
6 funded debt, if the letters of credit were  
7 included, you would subtract more than  
8 1.5318 billion, correct?  
9 MR. LIUBICIC: Object to the  
10 form.  
11 MR. PARADISE: Same objection.  
12 A. I'm sorry, where are you on the  
13 sheet?  
14 Q. Appendix C-1.  
15 A. Which line?  
16 Q. The line that says "less total 1L  
17 funded debt."  
18 A. And you're asking me?  
19 Q. The question I just asked you:  
20 Your calculation for total 1L funded debt  
21 if letters of credit were included would be  
22 more than 1.5318 billion, correct?  
23 MR. PARADISE: That is a  
24 different question.  
25 Can we have one objection is an

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1  
2 objection for all?  
3 MR. GENENDER: I don't think we  
4 agreed to that, but I think it makes  
5 sense. We have been doing this for  
6 three days, yes.  
7 MR. PARADISE: Okay.  
8 MR. GENENDER: Thanks.  
9 MR. PARADISE: Relax, Paul. I'm  
10 asking a question.  
11 MR. GENENDER: I'm very relaxed.  
12 I'm trying to get an answer to my  
13 question.  
14 A. I think that whole analysis would  
15 change if the letters of credit were  
16 included as funded debt.  
17 Q. Thank you.  
18 A. So I'm not sure that analysis  
19 would even be appropriate.  
20 Q. 1.5318 billion would not be the  
21 correct number if the letters of credit  
22 were included as 1L funded debt, correct?  
23 A. Well, this whole, the whole  
24 analysis wouldn't be, so you just can't  
25 change that in isolation.

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1  
2 But, yes, if you were doing an  
3 analysis of collateral value versus funded  
4 debt, if your funded debt was deemed to be  
5 higher, then you would adjust it higher,  
6 but that may mean that you may have to  
7 adjust your collateral value.  
8 Q. Okay. You are certain aspects of  
9 the 2L collateral would not be 2L  
10 collateral, that could bring that number  
11 lower, correct?  
12 MR. LIUBICIC: Objection to form.  
13 Vague and ambiguous.  
14 A. Can you restate the question?  
15 Q. Never mind.  
16 A. Sorry.  
17 Q. Never mind.  
18 You're aware that one of the  
19 other experts included letters of credit as  
20 part of the 1L funded debt?  
21 A. I am aware that one of the other  
22 experts in his report provided a scenario  
23 in which it was included, but I don't know  
24 that the expert concluded that they should  
25 be included in funded debt.

Page 84

1  
2 Q. Your 1L debt balances on page 65  
3 of your report did not include postpetition  
4 interest or prepetition accrued interest,  
5 correct?  
6 A. Correct.  
7 Q. You'd agree there is substantial  
8 corporate overhead required to liquidate  
9 collateral, correct?  
10 MR. LIUBICIC: Objection. Vague  
11 and ambiguous.  
12 A. I'm aware that management  
13 provided input to Tiger that the corporate  
14 overhead would be approximately \$49  
15 million.  
16 Q. Did you include that?  
17 A. Yes.  
18 Q. Where? Is it on page 65?  
19 A. The NOLV percentage that's  
20 applied to the inventory already takes that  
21 into account.  
22 Q. For up to 12 weeks, right?  
23 A. For the period of time that was  
24 projected by Tiger.  
25 Q. Which is up to 12 weeks, right?

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1  
2 A. Correct.  
3 Q. Thank you.  
4 The number \$54.8 million for  
5 eligible credit card receivables from the  
6 borrowing base that you use on page 65 of  
7 your report for -- and you call it credit  
8 card receivables.  
9 Do you see that figure?  
10 A. Yes.  
11 Q. Are you aware that the other two  
12 experts for the other -- for the second  
13 lienholders use a higher figure than that  
14 which they derived from a general ledger?  
15 A. I'm not aware.  
16 Q. You think this is the appropriate  
17 number to use, don't you, from the  
18 borrowing base certificate, 54.8 million?  
19 A. I'd have to consider that,  
20 reviewing the methodology as a whole.  
21 If, for example, they had a  
22 ledger that was as of the filing date, it  
23 may be that in the context of the  
24 methodology they applied, that their number  
25 for credit card receivables is correct.

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1  
2 Q. Ms. Murray, my question was just,  
3 you think this is the appropriate number to  
4 use, the 54.8 million from the borrowing  
5 base certificate for credit card  
6 receivables; is that right?  
7 A. In the context of my methodology  
8 and my approach, I think it's the correct  
9 number to use.  
10 Q. Thank you. That was all I was  
11 asking.  
12 Would you agree that the NOLV  
13 percentage from the Tiger report excludes  
14 certain corporate overhead -- corporate  
15 expenses required to sell the inventory?  
16 MR. LIUBICIC: Object to the  
17 form. Vague and ambiguous.  
18 A. No, I don't agree.  
19 Q. Are you aware that your client in  
20 this case, Cyrus, favored a going-concern  
21 sale rather than a liquidation?  
22 MR. LIUBICIC: Objection. Lack  
23 of foundation.  
24 A. No, I'm not aware.  
25 Q. Have you reviewed any

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1  
2 correspondence in connection with whether  
3 the second lienholders, any second  
4 lienholders were -- favored a going-concern  
5 sale versus a liquidation?  
6 A. Correspondence?  
7 Q. Letters.  
8 A. I don't know that I reviewed any  
9 actual letters.  
10 Q. Your client in this matter,  
11 Cyrus, was also a junior DIP lender, wasn't  
12 it?  
13 A. My client in this matter is  
14 Milbank.  
15 Q. Who is Milbank's client in this  
16 matter?  
17 A. Milbank's client is Cyrus.  
18 Q. Okay. Do you know who Cyrus is?  
19 A. Yes.  
20 Q. Cyrus was the junior DIP lender  
21 in this proceeding, correct?  
22 A. Yes, that's my understanding.  
23 Q. Do you know what happened to the  
24 junior DIP loan in connection with the  
25 sale, the 363 sale that closed on or about

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1  
2 February 11th, 2019?  
3 A. As I recall, it was rolled.  
4 Q. That was Cyrus's choice to roll  
5 the junior debt, correct?  
6 A. I don't know the answer to that.  
7 Q. What does it mean to roll a  
8 junior debt? Do you have an understanding  
9 as to what that means?  
10 A. My understanding of what that  
11 means is that the liability is assumed by  
12 the new company.  
13 Q. Which would be something that a  
14 lender would do if it favored the  
15 transaction, correct?  
16 MR. LIUBICIC: Objection.  
17 MR. PARADISE: Objection.  
18 MR. LIUBICIC: Lack of  
19 foundation. Calls for speculation.  
20 A. I can't really comment on that.  
21 It's really outside the scope of my report.  
22 (Murray Exhibit 5, Declaration of  
23 Brandon Aebersold, marked for  
24 identification, as of this date.)  
25 BY MR. GENENDER:

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1  
2 Q. I show what's been marked as  
3 Exhibit 5 to your deposition.  
4 (Document review.)  
5 Q. Have you seen Exhibit 5 before?  
6 A. Yes, but I have not read it in  
7 detail.  
8 Q. Have you seen any of the -- I  
9 just want to ask you, there's four attached  
10 letters to it.  
11 Can you turn to what's, up at the  
12 top, page 11 of 36?  
13 (Witness complies.)  
14 Q. An October 31st letter to Ray  
15 Schrock from Sean O'Neal?  
16 A. Yes. I'm not familiar with this.  
17 Q. Did you rely upon it in preparing  
18 your report?  
19 A. No.  
20 Q. Did you --  
21 A. This letter?  
22 Q. Yes.  
23 A. No.  
24 Q. Did you consider it in preparing  
25 your report?

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1  
2 A. I don't recall.  
3 Q. You don't recall considering it  
4 in preparing your report?  
5 A. No.  
6 Q. My question is, did you consider  
7 it in preparing your report, yes or no?  
8 A. I don't recall.  
9 Q. Well, have you ever seen it  
10 before right now?  
11 A. I can't say. It's not ringing a  
12 bell.  
13 Q. Okay. Do you have a present  
14 recollection of considering it in  
15 connection with your report?  
16 (Document review.)  
17 A. No.  
18 Q. Okay. Is it listed on the  
19 materials that you reviewed in connection  
20 with preparing your report?  
21 A. I don't know.  
22 Q. It's not, is it?  
23 A. I don't know.  
24 Q. Okay. What about Exhibit B to  
25 Exhibit 5, have you ever seen that before,

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1  
2 November 2, 2018, letter to Ray Schrock  
3 from Sean O'Neal?  
4 A. I'm just reviewing it. I'm  
5 sorry.  
6 What was your question?  
7 Q. Have you ever seen it before?  
8 A. I may have, but I don't recall  
9 it.  
10 Q. Did you rely upon it in preparing  
11 your report?  
12 A. I don't recall having relied on  
13 it.  
14 Q. Would you turn to Exhibit C to  
15 Exhibit 5, a January 7th letter to the  
16 board of directors at Sears from Jim  
17 Bromley on behalf of ESL.  
18 Have you seen that letter before?  
19 A. Let me review it.  
20 (Document review.)  
21 A. It's not ringing a bell.  
22 Q. In preparing your report, were  
23 you aware that ESL favored a going-concern  
24 sale rather than liquidation?  
25 MR. LIUBICIC: Objection. Lack

Page 92

1  
2 of foundation.  
3 A. I was generally aware that ESL  
4 was trying to effectuate a going-concern  
5 sale.  
6 Q. Are you aware that ESL, in trying  
7 to effectuate a going-concern sale by  
8 writing to the Sears board, referenced  
9 Cyrus?  
10 A. No, I'm not.  
11 Q. Can you turn to page 5 of Exhibit  
12 C to Exhibit 5, which is page 35 of 36?  
13 (Witness complies.)  
14 A. Was there a section you wanted me  
15 to read?  
16 Q. Are you on that page?  
17 A. I am.  
18 Q. Look at the bottom of the page,  
19 you see it says, "The decision to reject  
20 the going-concern proposal is simply not a  
21 decision that is consistent with the  
22 fiduciary duties that the members of the  
23 subcommittee owe to the debtors' creditors,  
24 including the debtors' largest creditors,  
25 ESL and Cyrus."



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1  
2 Do you see that?  
3 A. I do.  
4 Q. And then if you go up, under  
5 fourth, it says "A rejection of the ESL  
6 proposal violates the very real duties that  
7 the board and the subcommittee owed ESL and  
8 to Cyrus, which is participating in the  
9 bid, both of which are the debtors' largest  
10 senior secured creditors."  
11 Did I read that correctly?  
12 A. Yes.  
13 Q. Were you aware that Cyrus  
14 participated in ESL's bid to purchase all  
15 or substantially all the assets of Sears?  
16 MR. LIUBICIC: Objection. Lack  
17 of foundation.  
18 A. What was your question?  
19 Q. Were you aware that Cyrus  
20 participated in ESL's bid to purchase all  
21 or substantially all the assets of Sears?  
22 MR. LIUBICIC: Same objection.  
23 A. I'm aware they owned 2L debt,  
24 which was part of the credit bid.  
25 Q. Can you answer my question: Were

Page 94

1  
2 you aware that Cyrus participated in ESL's  
3 bid to purchase all or substantially all  
4 the assets of Sears?  
5 A. Yes --  
6 MR. LIUBICIC: Same objection.  
7 A. Yes, to the extent that Cyrus  
8 owned 2L debt which was a credit bid, I was  
9 aware of that.  
10 Q. Thank you.  
11 In your report on pages 11  
12 through 15, you speak about the letters of  
13 credit, correct?  
14 A. Correct.  
15 Q. In paragraph 41 you state that  
16 "These LCs did not represent funded debt or  
17 an actual claim against collateral as of  
18 filing date."  
19 Do you see that?  
20 A. Yes.  
21 Q. Have you spoken to any of the  
22 counterparties with respect to the letters  
23 of credit?  
24 A. Counterparties, you mean...  
25 Q. The parties who would seek to

Page 95

1  
2 have them paid.  
3 A. No, I have not.  
4 Q. Do you know whether those letters  
5 of credit would ever been released?  
6 A. Released?  
7 Q. Yes.  
8 MR. LIUBICIC: Object to the  
9 form.  
10 A. What do you mean by "released"?  
11 Q. Do you know what claims could be  
12 made against those letters of credit at any  
13 point in the future?  
14 A. In certain cases, yes.  
15 Q. Which claims?  
16 A. About two-thirds of them related  
17 to workers' compensation claims and states  
18 where Kmart is self-insured.  
19 Q. Are you aware that lenders are  
20 reluctant to let letters of credit go for  
21 years into the future until they know that  
22 there will be no claims made against them?  
23 MR. PARADISE: Objection.  
24 MR. LIUBICIC: Object to form.  
25 A. No, I'm not aware.

Page 96

1  
2 Q. Are you aware that insurers take  
3 the same position?  
4 MR. LIUBICIC: Object to form.  
5 A. And that position is?  
6 Q. That the letters of credit need  
7 to stay in place into the future to insure  
8 against claims being made against those  
9 letters of credit?  
10 A. No, I'm not aware.  
11 Q. Do you have expertise in how  
12 letters of credit work?  
13 A. Yes.  
14 Q. Have you talked with -- have you  
15 done any -- have you consulted any  
16 individuals who have experienced with how  
17 long letters of credit stay in place into  
18 the future in a bankruptcy in situations  
19 such as this?  
20 A. Yes.  
21 Q. Who did you speak with?  
22 A. Counsel.  
23 Q. Who?  
24 A. Milbank.  
25 Q. Who at Milbank?



Page 97

1  
2 A. An attorney at Milbank who I  
3 don't recall his name.  
4 Q. And you're relying upon that?  
5 A. I'm relying on my own experience,  
6 and I'm relying on discussions with  
7 counsel.  
8 Q. You'd agree it's just a matter of  
9 simple math that if the letters of credit  
10 were to be included in IL funded debt, it  
11 would change your opinion as to the value,  
12 as to the diminution in value represented  
13 by your purported 507(b) figures, correct?  
14 A. Not necessarily.  
15 Q. So if they were included as IL  
16 funded debt, it wouldn't change any of your  
17 numbers?  
18 A. Not necessarily.  
19 Q. So you could envision a situation  
20 which \$395 million letter of credit were  
21 included as IL debt, it wouldn't change  
22 your ultimate figures on Appendix C-1 or  
23 C-2?  
24 A. It would depend on why the  
25 letters of credit were funded and whether

Page 98

1  
2 or not there was actual liability relating  
3 to those letters of credit. Because even  
4 if they were funded, it does not mean that  
5 there is a funded debt obligation with no  
6 offsetting asset. There could very well be  
7 an offsetting asset.  
8 Q. You've assumed there is not,  
9 correct?  
10 A. I'm sorry?  
11 Q. You've assumed that there is not  
12 an offsetting asset, correct?  
13 A. I've assumed that the LCs are not  
14 funded debt.  
15 Q. Correct. That's your assumption,  
16 right?  
17 A. Correct.  
18 Q. And the basis of it is speaking  
19 with a lawyer at Milbank whose name you  
20 don't remember as you sit here?  
21 MR. LIUBICIC: Objection.  
22 Mischaracterizes testimony.  
23 A. The basis of it is that the LCs  
24 were not drawn as of the filing date, which  
25 is the measurement date. And given the

Page 99

1  
2 nature of what the LCs were for and the  
3 fact that only 9 million of LCs were  
4 actually drawn over the course of the  
5 bankruptcy case, and given the fact that it  
6 was public knowledge that this company was  
7 in dire financial condition, and given the  
8 fact that there had been other large  
9 retailers that had been similarly situated,  
10 and even with that knowledge, only 9  
11 million of these LCs were funded over the  
12 bankruptcy, and given my discussions with  
13 counsel, I have concluded that it is  
14 inappropriate to include them in funded  
15 debt as of the filing date.  
16 MR. GENENDER: I object to --  
17 A. And that even if they were to be  
18 considered part of funded debt, that there  
19 would mostly be an offsetting asset.  
20 MR. GENENDER: I'm going to  
21 object to the nonresponsive portion of  
22 the answer.  
23 BY MR. GENENDER:  
24 Q. Were the letters of credit that  
25 you didn't include cash collateralized?

Page 100

1  
2 A. I don't know the answer to that.  
3 Q. Are you aware there are claims  
4 being paid by these letters of credit on a  
5 daily basis?  
6 A. I'm aware that 9 million has been  
7 drawn over the course of the bankruptcy.  
8 Q. Is that a yes?  
9 A. That 9 million may include claims  
10 being paid, as you say, on a daily basis,  
11 but I'm not aware that there is any other  
12 liability other than that \$9 million  
13 associated with the letters of credit over  
14 the course of the bankruptcy.  
15 Q. Okay. Does your report offer an  
16 opinion as to what an appropriate 506(c)  
17 surcharge would be?  
18 A. Yes. My opinion is that any  
19 costs for liquidating or preserving the  
20 collateral is already included in my  
21 valuation of the collateral.  
22 Q. So is that your way of saying  
23 there shouldn't be a 506(c) surcharge?  
24 A. It's my way of saying that's  
25 already taken into account in coming to the

1  
2 value of the collateral.  
3 Q. Do you have an opinion as to the  
4 appropriate amount of a 506(c) surcharge to  
5 which the debtors are entitled in this  
6 case?  
7 A. It's already incorporated into  
8 the value of the collateral, so I can go in  
9 and I can back out all of the expenses that  
10 are assumed in the Tiger report and add  
11 those all together, but that would be my  
12 answer.  
13 Q. Have you done that?  
14 A. I can do it.  
15 Q. I'm just asking if you've done it  
16 in your report.  
17 A. I have. It's already included in  
18 the value of the collateral -- of the  
19 collateral as described in the report.  
20 Q. Can you show me the number where  
21 in your report you include the 506(c)  
22 surcharge number?  
23 A. It's the 88.7 percent.  
24 MR. PARADISE: Objection.  
25 A. It's incorporated into the 88.7

1  
2 percent.  
3 Q. So when you take the  
4 2.391 billion and apply 88.7 percent to it,  
5 are you saying that some portion of the  
6 11.3 percent reduction in that inventory  
7 number is what you consider to be a 506(c)  
8 surcharge?  
9 MR. LIUBICIC: Objection.  
10 Mischaracterizes testimony. Calls for  
11 a legal conclusion.  
12 A. I'm not characterizing it as a  
13 506(c) surcharge. What I'm saying is that  
14 88.7 percent already takes into account all  
15 the reasonable and necessary expenses of  
16 preserving and monetizing the collateral,  
17 which is based on information that  
18 management provided to Tiger.  
19 Q. That's in a liquidation analysis,  
20 correct?  
21 A. It's in a net orderly liquidation  
22 value, assuming companywide  
23 going-out-of-business sale.  
24 Q. Have you done any analysis of  
25 what an appropriate 506(c) surcharge would

1  
2 be in connection with what happened in the  
3 case with respect to a going-concern sale?  
4 A. I have not done a separate  
5 analysis of that.  
6 Q. Are you able to speak to the  
7 reasonable and necessary expenses incurred  
8 by the estate, for example, between  
9 December 28, 2018, when ESL submitted its  
10 first bid, and February 11th, 2019, when  
11 the sale transaction closed as to expenses  
12 reasonably and necessarily incurred by the  
13 debtors for the primary benefit of  
14 preservation of the collateral? Have you  
15 calculated that amount?  
16 A. Can you repeat that?  
17 MR. GENENDER: Read it back.  
18 (Question was read back as  
19 follows:  
20 "QUESTION: Are you able to speak  
21 to the reasonable and necessary  
22 expenses incurred by the estate, for  
23 example, between December 28, 2018,  
24 when ESL submitted its first bid, and  
25 February 11th, 2019, when the sale

1  
2 transaction closed as to expenses  
3 reasonably and necessarily incurred by  
4 the debtors for the primary benefit of  
5 preservation of the collateral? Have  
6 you calculated that amount?")  
7 A. No, I have not.  
8 Q. Have you calculated any amount  
9 incurred by the debtors reasonably and  
10 necessary for the primary purpose of  
11 preserving collateral value belonging to  
12 the 2Ls in this case?  
13 MR. LIUBICIC: Objection. Asked  
14 and answered.  
15 A. I haven't calculated it. I  
16 relied on the information in the Tiger  
17 report as to the reasonable and necessary  
18 expenses of preserving and monetizing the  
19 collateral based on information that Tiger  
20 received from management.  
21 Q. The Tiger report only speaks to a  
22 scenario in which there would be a net  
23 orderly liquidation, correct?  
24 A. Yes, the premise of value is a  
25 companywide going-out-of-business sale.

1  
2 Q. Okay. Have you done any analysis  
3 or calculation of what an appropriate  
4 506(c) surcharge would be in a  
5 going-concern scenario, such as what  
6 happened in this case?  
7 A. I have not done a separate  
8 calculation.  
9 Q. You haven't done any calculation  
10 in that scenario, correct?  
11 A. The companywide  
12 going-out-of-business sale scenario was one  
13 of two envisioned scenarios for the  
14 company. The other scenario being a sale  
15 as a going-concern. Some stores closed  
16 with GOB sales completed and then the sale  
17 of some other discreet assets.  
18 So the entire analysis is  
19 different if you're talking about a  
20 going-concern sale because the value -- the  
21 premise of value then for the collateral is  
22 going to be different.  
23 So to do an apples-to-apples  
24 comparison, the whole analysis would have  
25 to be different.

1  
2 MR. GENENDER: I'm going to  
3 object to the nonresponsive portion,  
4 nonresponsive answer in its entirety.  
5 Move to strike.  
6 BY MR. GENENDER:  
7 Q. So Ms. Murray, my question is,  
8 have you done any calculations for 506(c)  
9 surcharges in a going-concern sale  
10 scenario, yes or no?  
11 A. No.  
12 Q. Thank you.  
13 Your report, paragraph 47, can  
14 you read the first line, please, the first  
15 sentence?  
16 A. Yes.  
17 Q. Can you read it, please?  
18 A. "As of the filing date, the  
19 debtors' stated objective was to preserve  
20 Sears as a going-concern based on a viable  
21 smaller store footprint."  
22 Q. Thank you.  
23 That is a sentence you wrote,  
24 correct?  
25 A. Correct.

1  
2 Q. Thank you.  
3 Are you aware Mr. Henrich  
4 testified there should be a 506(c)  
5 surcharge in this case?  
6 A. No.  
7 Q. Are you aware that his report  
8 includes a number north of \$200 million for  
9 a 506(c) surcharge?  
10 A. I'm aware that he -- he used a  
11 different methodology to come to his  
12 conclusions, and his methodology may have  
13 included a 506(c) surcharge, and his  
14 methodology may also have included a higher  
15 value of the inventory than what I had  
16 because it did not take into account cost  
17 and expenses necessary to preserve the  
18 value of the collateral and monetize it.  
19 Q. Are you aware that there could be  
20 costs and expenses to preserve the  
21 collateral that would have occurred beyond  
22 the 12-week period contemplated by the  
23 Tiger report?  
24 MR. PARADISE: Objection.  
25 MR. LIUBICIC: Objection. Lack

1  
2 of foundation.  
3 MR. PARADISE: Calls for  
4 speculation.  
5 A. Can you repeat it?  
6 Q. Are you aware that there could be  
7 costs and expenses to preserve the  
8 collateral that would have occurred beyond  
9 the 12-week period contemplated by the  
10 Tiger report?  
11 MR. LIUBICIC: Same objection.  
12 MR. PARADISE: Same.  
13 A. I mean, intuitively, that doesn't  
14 make sense to me because the Tiger report  
15 is based on selling the collateral within  
16 12 weeks. So I don't understand how you  
17 would have expenses to preserve it if it  
18 was all sold.  
19 Q. Because that's the assumption  
20 that it makes for purposes of its  
21 calculations, "it's" being the Tiger  
22 report, correct?  
23 A. Correct.  
24 Q. Thank you.  
25 THE WITNESS: Is this an okay

1  
2 time for a break?  
3 MR. GENENDER: If you need a  
4 break, that's fine.  
5 (Recess is taken.)  
6 BY MR. GENENDER:  
7 Q. Ms. Murray, are you aware that  
8 the letters of credit were assumed as part  
9 of the Asset Purchase Agreement that closed  
10 on February 11th, 2019?  
11 A. Yes, I'm aware that the 271  
12 million facility was assumed.  
13 Q. Are you aware that it was counted  
14 as part of the cash consideration in that  
15 transaction?  
16 A. I'm not aware it was considered  
17 part of the cash consideration.  
18 Q. Are you aware that the letters of  
19 credit would be used if any payments were  
20 missed by Sears down the road?  
21 MR. LIUBICIC: Objection. Vague  
22 and ambiguous.  
23 A. I don't know what payments you're  
24 referring to.  
25 Q. Are you aware that liabilities

1  
2 that could trigger the letters of credit  
3 could occur 10 to 15 years down the road?  
4 MR. PARADISE: Objection.  
5 A. No.  
6 Q. Are you aware that the letters of  
7 credit funded high deductible plans and  
8 that the estate funds these plans on a  
9 daily basis?  
10 MR. LIUBICIC: Objection. Vague  
11 and ambiguous.  
12 MR. PARADISE: Objection.  
13 A. I'm sorry, can you repeat that  
14 question?  
15 Q. Are you aware that the letters of  
16 credit funded high deductible plans that  
17 the estate funds these plans on a daily  
18 basis?  
19 MR. LIUBICIC: Same objections.  
20 A. No.  
21 Q. You understand that there are  
22 expenses that a Chapter 11 estate has to  
23 incur to run the estate, correct?  
24 A. Yes.  
25 Q. Are you aware that the 1Ls

1  
2 negotiated a 506(c) waiver?  
3 A. Yes.  
4 Q. Do you know what that means?  
5 A. I have a business understanding  
6 of what it means.  
7 Q. Sure.  
8 What is that?  
9 A. That they are exempt from a  
10 506(c) surcharge.  
11 Q. What impact would that have on a  
12 506(c) surcharge that the 2Ls could be  
13 subject to, if you know?  
14 MR. LIUBICIC: Objection to the  
15 extent it calls for a legal conclusion.  
16 A. I think that's a legal question.  
17 Q. Going back to the letters of  
18 credit, are you aware that ongoing payments  
19 that the estate would have to make are  
20 separate and apart from the \$9 million of  
21 monies that have been paid to date?  
22 A. Can you be more specific about  
23 what payments you're referring to?  
24 Q. Against any future claims.  
25 MR. LIUBICIC: Objection. Vague

1  
2 and ambiguous.  
3 A. Claims relating to -- can you be  
4 more specific about claims relating to  
5 what?  
6 Q. Workers' comp, anything that  
7 would be referenced -- anything that could  
8 be subject to letters of credit.  
9 A. Well, it appears to me that would  
10 just be ordinary course of business  
11 expenses that the company would incur to  
12 the extent that the company was in  
13 business.  
14 Q. You understand that the Tiger  
15 report didn't take into account corporate  
16 overhead as an expense?  
17 A. No, I don't understand it.  
18 MR. LIUBICIC: Objection. Lack  
19 of foundation.  
20 BY MR. GENENDER:  
21 Q. You don't understand that?  
22 A. No.  
23 Q. You don't know that one way or  
24 the other or you disagree with it?  
25 A. I disagree with it.

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1  
2 Q. You think it did take into  
3 account corporate overhead?  
4 A. Yes.  
5 Q. Did your report take into account  
6 claims that could be made by unsecured  
7 creditors against collateral that was not  
8 2L collateral?  
9 A. Can you be more specific about  
10 what collateral you're referring to?  
11 Q. Cash, scripts and pharmacy  
12 receivables that added up to -- remember we  
13 went through the exercise and it added up  
14 to 206 or 207 million dollars?  
15 A. Yes. But that is 2L collateral.  
16 Q. That's your opinion, right?  
17 A. Yes.  
18 Q. Okay.  
19 A. And so your question is?  
20 Q. Can I ask it?  
21 A. Yes, please.  
22 Q. Thank you.  
23 Did your report take into account  
24 claims that could be made by unsecured  
25 creditors against those assets where they

Page 114

1  
2 determined not to be 2L collateral?  
3 A. No.  
4 MR. PARADISE: Objection.  
5 BY MR. GENENDER:  
6 Q. You understand the unsecured  
7 creditors could have a claim against those  
8 assets if they're not 2L collateral, don't  
9 you?  
10 MR. LIUBICIC: Objection. Calls  
11 for a legal conclusion.  
12 BY MR. GENENDER:  
13 Q. Can you answer?  
14 A. What was the question?  
15 Q. The question remains, you  
16 understand that the unsecured creditors  
17 could have a claim against those assets if  
18 those assets are determined not to be 2L  
19 collateral, correct?  
20 MR. LIUBICIC: Same objection.  
21 A. I don't know who would have a  
22 claim to those assets.  
23 Q. Thank you.  
24 The second lienholder's credit  
25 bid to the amount of \$433.5 million in

Page 115

1  
2 connection with the sale transaction,  
3 correct?  
4 A. Correct.  
5 Q. Do you believe that the  
6 bankruptcy estate expended reasonable and  
7 necessary monies to benefit the second  
8 lienholder's ability to make that credit  
9 bid?  
10 MR. LIUBICIC: Object to the  
11 extent it calls for a legal conclusion.  
12 A. That's really outside the scope  
13 of my report.  
14 Q. So you're not offering an opinion  
15 in that regard; is that correct?  
16 A. Correct.  
17 Q. Thank you.  
18 MR. GENENDER: Why don't we take  
19 a short break.  
20 MR. LIUBICIC: Okay.  
21 (Recess is taken.)  
22 BY MR. GENENDER:  
23 Q. Ms. Murray, I asked you and you  
24 said you were aware that the 1L has a  
25 506(c) waiver in connection with the sale

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1  
2 transaction, correct?  
3 A. Correct.  
4 Q. Are you aware that your client  
5 Cyrus also requested and got a 506(c)  
6 waiver in connection with rolling its  
7 junior DIP into the transaction?  
8 A. No.  
9 Q. You did not know that?  
10 A. Not -- I'm not aware of it. I  
11 don't recall hearing about that.  
12 Q. Would it stand to reason that a  
13 party would request a 506(c) waiver because  
14 it thinks there otherwise might be -- it  
15 might be subject to a 506(c) surcharge?  
16 MR. LIUBICIC: Objection to the  
17 extent it calls for a legal conclusion.  
18 Speculation. Outside the scope of the  
19 report.  
20 A. I'm sorry, I think that is a  
21 legal question.  
22 Q. Well, your lawyer said that, but  
23 I'm going to focus on this.  
24 Is that just outside anything you  
25 considered in your report?



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1  
2 A. Yes.  
3 Q. That's fair. Thank you.  
4 MR. GENENDER: I'll pass the  
5 witness. Thank you.  
6 MR. LIUBICIC: Does anyone else  
7 have questions?  
8 MR. PARADISE: No questions.  
9 MR. GLACKIN: No questions.  
10 MR. LIUBICIC: And I have no  
11 questions.  
12 MR. GENENDER: Thank you.  
13 Nice to meet you.  
14 (Time noted: 12:02 p.m.)  
15  
16 \_\_\_\_\_  
17 MARTI P. MURRAY  
18  
19  
20 Subscribed and sworn to before me  
21 this day of 2019.  
22  
23 \_\_\_\_\_  
24  
25

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1  
2 C E R T I F I C A T E  
3  
4 STATE OF NEW YORK )  
5 : ss.  
6 COUNTY OF WESTCHESTER )  
7  
8 I, ANNETTE ARLEQUIN, a Notary  
9 Public within and for the State of New  
10 York, do hereby certify:  
11 That MARTI P. MURRAY, whose  
12 deposition is hereinbefore set forth,  
13 was duly sworn by me, and that the  
14 transcript of such depositions is a  
15 true record of the testimony given by  
16 such witness.  
17 I further certify that I am not  
18 related to any of the parties to this  
19 action by blood or marriage; and that I  
20 am in no way interested in the outcome  
21 of this matter.  
22 IN WITNESS WHEREOF, I have hereunto  
23 s  3rd day of July, 2019.  
24  
25 ANNETTE ARLEQUIN, CCR, RPR, CRR, RSA

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1  
2 I N D E X  
3  
4 WITNESS PAGE  
5  
6 MARTI P. MURRAY  
7 MR. GENENDER 6  
8  
9 I N D E X O F E X H I B I T S  
10 DESCRIPTION PAGE  
11  
12 Murray Exhibit 1, Expert Report  
of Marti P. Murray dated 6/18/19 18  
13  
14 Murray Exhibit 2, Tiger Asset  
Intelligent Sears Holdings  
Corporation Inventory Appraisal,  
15 Bates-stamped SEARS\_507b\_00001287  
through 1344 54  
16  
17 Murray Exhibit 3, Document with  
Estimated Script Asset Value, not  
18 Bates-stamped, 57  
19  
20 Murray Exhibit 4, Sears Holdings  
Corporation Borrowing Base  
Certificate as of October 13,  
21 2018, not Bates-stamped 68  
22  
23 Murray Exhibit 5, Declaration of  
Brandon Aebersold 88  
24  
25

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1  
2 ERRATA SHEET FOR THE TRANSCRIPT OF:  
3 CASE NAME: SEARS HOLDINGS  
4 DATE: JULY 3, 2019  
5 DEPONENT: MARTI P. MURRAY  
6 Pg. Ln. Now Reads Should Read Reason  
7  
8  
9  
10  
11  
12  
13  
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15  
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18  
19 MARTI P. MURRAY  
20 SUBSCRIBED AND SWORN BEFORE ME  
21 THIS \_\_\_ DAY OF \_\_\_ 2019.  
22  
23  
24 (Notary Public)  
25 MY COMMISSION EXPIRES: \_\_\_\_\_



# **Exhibit 100**

Page 1	Page 2
<p>UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK -----X In Re: SEARS HOLDINGS CORPORATION, et al., Debtor. Chapter 11 - Case No.: 18-23538 (RDD) -----X</p> <p>450 Park Avenue New York, New York</p> <p>July 10, 2019 2:12 p.m.</p> <p>DEPOSITION of BRIAN GRIFFITH, before Melissa Gilmore, a Shorthand Reporter and Notary Public of the State of New York.</p> <p>ELLEN GRAUER COURT REPORTING CO., LLC 126 East 56th Street, Fifth Floor New York, New York 10022 212-750-6434 REF: 277378B</p>	<p>1 APPEARANCES: 2 3 CLEARY GOTTLIEB STEEN &amp; HAMILTON LLP 4 Attorneys for ESL Investments, Inc. 5 One Liberty Plaza 6 New York, New York 10006 7 BY: THOMAS J. MOLONEY, ESQ. 8 KAL BLASSBERGER, ESQ. 9 PHONE 212-225-2460 10 E-MAIL tmoloney@cgsh.com 11 kblassberger@cgsh.com 12 13 14 WEIL, GOTSHAL &amp; MANGES, LLP 15 Attorneys for Debtors and Debtors-in-Possession, 16 Sears Holdings Corporation, et al. 17 200 Crescent Court, Suite 300 18 Dallas, Texas 75201-6950 19 BY: PAUL GENENDER, ESQ. 20 ERIN CHOI, ESQ. 21 PHONE 214-746-7877 22 E-MAIL paul.genender@weil.com 23 erin.choi@weil.com 24 25</p>
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<p>1 A P P E A R A N C E S: (Cont'd)</p> <p>2</p> <p>3 SEYFARTH SHAW LLP</p> <p>4 Attorneys for Wilmington Trust National</p> <p>5 Association, as Indenture Trustee and Collateral</p> <p>6 Agent</p> <p>7 620 Eighth Avenue</p> <p>8 New York, New York 10018-1405</p> <p>9 BY: EDWARD M. FOX, ESQ.</p> <p>10 STEVEN PARADISE, ESQ.</p> <p>11 PHONE 212-218-4646</p> <p>12 E-MAIL emfox@seyfarth.com</p> <p>13 sparadise@seyfarth.com</p> <p>14</p> <p>15</p> <p>16 ALSO PRESENT:</p> <p>17 WILLIAM HENRICH, Getzler Henrich</p> <p>18 MARTI MURRAY, the Brattle Group</p> <p>19 JAKUB MLECZKO, Perella Weinberg</p> <p>20 LUKE ANDREWS, Getzler Henrich</p> <p>21 JENN POLLAN, Cleary Summer Associates (Via Telephone)</p> <p>22 TOM KRELLER, ESQ., Milbank (Via Telephone)</p> <p>23 JACQUELINE ROSEN, ESQ., Milbank (Via Telephone)</p> <p>24 SAM PAYNE, ESQ., Milbank (Via Telephone)</p> <p>25 ERIC REIMER, ESQ., Milbank (Via Telephone)</p>	<p>1 ----- I N D E X -----</p> <p>2 WITNESS EXAMINATION BY PAGE</p> <p>3 BRIAN GRIFFITH MR. MOLONEY 14</p> <p>4 MR. LIUBICIC 163</p> <p>5 MR. FOX 235</p> <p>6</p> <p>7 MOTIONS: PAGES 41, 72, 120, 127, 131, 134, 138,</p> <p>8 177, 183, 192, 226, 234, 257, 264, 274</p> <p>9</p> <p>10</p> <p>11 ----- DOCUMENT REQUESTS -----</p> <p>12 PAGE 139 We will just leave a blank here.</p> <p>13 If you find something, you can</p> <p>14 add it in when you review the</p> <p>15 transcript</p> <p>16</p> <p>17</p> <p>18 ----- E X H I B I T S -----</p> <p>19 GRIFFITH DESCRIPTION FOR I.D.</p> <p>20 Exhibit 1 Stipulation and Order 11</p> <p>21 Concerning the Resolution</p> <p>22 of Certain Section 501(b)</p> <p>23 Claims, Dated June 21,</p> <p>24 2019</p> <p>25</p>
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<p>1 ----- E X H I B I T S (Cont'd) -----</p> <p>2 GRIFFITH DESCRIPTION FOR I.D.</p> <p>3 Exhibit 2 Notice of Deposition of 11</p> <p>4 Brian J. Griffith</p> <p>5 Exhibit 3 Second Lien Parties' 11</p> <p>6 First Consolidated</p> <p>7 Request for Production of</p> <p>8 Documents Directed to the</p> <p>9 Debtors, June 4, 2019</p> <p>10 Exhibit 4 Declaration of Brian J. 11</p> <p>11 Griffith, dated May 26,</p> <p>12 2019</p> <p>13 Exhibit 5 Supplemental Declaration 11</p> <p>14 of Brian J. Griffith,</p> <p>15 Dated June 27, 2019</p> <p>16 Exhibit 6 Expert Worksheet - Draft 12</p> <p>17 Exhibit 7 Document, Bates Stamped 12</p> <p>18 SEARS_507B_00001508</p> <p>19 Exhibit 8 Letter to Transform 12</p> <p>20 Holdco, Dated</p> <p>21 February 10, 2019</p> <p>22 Exhibit 9 Joint Exhibit 14 12</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 ----- E X H I B I T S (Cont'd) -----</p> <p>2 GRIFFITH DESCRIPTION FOR I.D.</p> <p>3 Exhibit 10 Tiger Inventory 12</p> <p>4 Appraisal, Bates Stamped</p> <p>5 SEARS_507B_00001213</p> <p>6 through 1286</p> <p>7 Exhibit 11 Tiger Inventory 12</p> <p>8 Appraisal, Bates Stamped</p> <p>9 SEARS_507B_00001287</p> <p>10 through 1344</p> <p>11 Exhibit 12 Letter to Lazard Frères &amp; 12</p> <p>12 Co. LLC, Dated December</p> <p>13 28, 2018</p> <p>14 Exhibit 13 Letter to Lazard Frères &amp; 13</p> <p>15 Co. LLC, Dated January 9,</p> <p>16 2019</p> <p>17 Exhibit 14 Asset Purchase Agreement, 13</p> <p>18 Dated January 17, 2019</p> <p>19 Exhibit 15 Form 10-K of Sears 13</p> <p>20 Holdings Corporation</p> <p>21 Exhibit 16 Expert Report of David M. 13</p> <p>22 Schulte</p> <p>23 Exhibit 17 Expert Report of Marti P. 13</p> <p>24 Murray, Dated June 18,</p> <p>25 2019</p>

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<p>1 ----- E X H I B I T S (Cont'd) -----</p> <p>2 GRIFFITH DESCRIPTION FOR I.D.</p> <p>3 Exhibit 18 Declaration of Mohsin Y. 13</p> <p>4 Meghji, Dated October 15,</p> <p>5 2018</p> <p>6 Exhibit 19 Final Order, Dated 13</p> <p>7 November 30, 2018</p> <p>8 Exhibit 20 Declaration of Mohsin Y. 13</p> <p>9 Meghji, Dated February 1,</p> <p>10 2019</p> <p>11 Exhibit 21 Declaration of Alan J. 14</p> <p>12 Carr, Dated February 1,</p> <p>13 2019</p> <p>14 Exhibit 22 Declaration of Robert A. 14</p> <p>15 Riecker, Dated</p> <p>16 November 23, 2018</p> <p>17 Exhibit 23 Project Blue - 203</p> <p>18 Liquidation Bids Review,</p> <p>19 Dated December 2018</p> <p>20 Exhibit 24 Minutes of a Meeting of 208</p> <p>21 the Restructuring</p> <p>22 Committee, Dated</p> <p>23 January 5, 2019</p> <p>24 Exhibit 25 Expert Report of William 248</p> <p>25 Henrich</p>	<p>1 ----- E X H I B I T S (Cont'd) -----</p> <p>2 GRIFFITH DESCRIPTION FOR I.D.</p> <p>3 Exhibit 26 Rolling 13-week Cash Flow 259</p> <p>4 Forecast for Week Six</p> <p>5 Exhibit 27 Wind Down Recoveries, 269</p> <p>6 Dated January 12, 2019</p> <p>7 Exhibit 28 Rolling Cash Flow Budget 270</p> <p>8 for Week 15</p> <p>9 Exhibit 29 Project Blue Actuals from 287</p> <p>10 Week Ended January 26</p> <p>11 through February 9</p> <p>12 Exhibit 30 ESL Bid Analysis, Bates 295</p> <p>13 Stamped SEARS_507B_31</p> <p>14 through 60</p> <p>15 Exhibit 31 Stock Ledger Detail 298</p> <p>16</p> <p>17</p> <p>18 (EXHIBITS TO BE PRODUCED)</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
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<p>1 BRIAN GRIFFITH, called as a</p> <p>2 witness, having been duly sworn by a</p> <p>3 Notary Public, was examined and testified</p> <p>4 as follows:</p> <p>5 (Griffith Exhibit 1, Stipulation and</p> <p>6 Order Concerning the Resolution of Certain</p> <p>7 Section 501(b) Claims, Dated June 21,</p> <p>8 2019, marked for identification.)</p> <p>9 (Griffith Exhibit 2, Notice of</p> <p>10 Deposition of Brian J. Griffith, marked</p> <p>11 for identification.)</p> <p>12 (Griffith Exhibit 3, Second Lien</p> <p>13 Parties' First Consolidated Request for</p> <p>14 Production of Documents Directed to the</p> <p>15 Debtors, June 4, 2019, marked for</p> <p>16 identification.)</p> <p>17 (Griffith Exhibit 4, Declaration of</p> <p>18 Brian J. Griffith, dated May 26, 2019,</p> <p>19 marked for identification.)</p> <p>20 (Griffith Exhibit 5, Supplemental</p> <p>21 Declaration of Brian J. Griffith, Dated</p> <p>22 June 27, 2019, marked for identification.)</p> <p>23 (Griffith Exhibit 6, Expert</p> <p>24 Worksheet - Draft, marked for</p> <p>25 identification.)</p>	<p>1 (Griffith Exhibit 7, Document, Bates</p> <p>2 Stamped SEARS_507B_00001508, marked for</p> <p>3 identification.)</p> <p>4 (Griffith Exhibit 8, Letter to</p> <p>5 Transform Holdco, Dated February 10, 2019,</p> <p>6 marked for identification.)</p> <p>7 (Griffith Exhibit 9, Joint Exhibit</p> <p>8 14, marked for identification.)</p> <p>9 (Griffith Exhibit 10, Tiger</p> <p>10 Inventory Appraisal, Bates Stamped</p> <p>11 SEARS_507B_00001213 through 1286, marked</p> <p>12 for identification.)</p> <p>13 (Griffith Exhibit 11, Tiger</p> <p>14 Inventory Appraisal, Bates Stamped</p> <p>15 SEARS_507B_00001287 through 1344, marked</p> <p>16 for identification.)</p> <p>17 (Griffith Exhibit 12, Letter to</p> <p>18 Lazard Frères &amp; Co. LLC, Dated</p> <p>19 December 28, 2018, marked for</p> <p>20 identification.)</p> <p>21 (Griffith Exhibit 13, Letter to</p> <p>22 Lazard Frères &amp; Co. LLC, Dated January 9,</p> <p>23 2019, marked for identification.)</p> <p>24</p> <p>25</p>

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<p>1 (Griffith Exhibit 14, Asset Purchase 2 Agreement, Dated January 17, 2019, marked 3 for identification.) 4 (Griffith Exhibit 15, Form 10-K of 5 Sears Holdings Corporation, marked for 6 identification.) 7 (Griffith Exhibit 16, Expert Report 8 of David M. Schulte, marked for 9 identification.) 10 (Griffith Exhibit 17, Expert Report 11 of Marti P. Murray, Dated June 18, 2019, 12 marked for identification.) 13 (Griffith Exhibit 18, Declaration of 14 Mohsin Y. Meghji, Dated October 15, 2018, 15 marked for identification.) 16 (Griffith Exhibit 19, Final Order, 17 Dated November 30, 2018, marked for 18 identification.) 19 (Griffith Exhibit 20, Declaration of 20 Mohsin Y. Meghji, Dated February 1, 2019, 21 marked for identification.) 22 (Griffith Exhibit 21, Declaration of 23 Alan J. Carr, Dated February 1, 2019, 24 marked for identification.) 25</p>	<p>1 (Griffith Exhibit 22, Declaration of 2 Robert A. Riecker, Dated November 23, 3 2018, marked for identification.) 4 5 EXAMINATION BY 6 MR. MOLONEY: 7 Q. I have to ask you to speak up, given 8 all the people here, so they can hear you, 9 okay? 10 A. Okay. 11 Q. Okay. Thanks. So could you please 12 state your full name and address for the 13 record? 14 A. Brian J. Griffith, 116 Manhasset 15 Woods Road, Manhasset, New York, 11030. 16 Q. And can you tell us what your 17 current position and title is? 18 A. I am a managing director at M-III 19 Partners. 20 Q. And could you tell me generally what 21 you did to prepare for your deposition today? 22 A. Reviewed documents and met with 23 counsel over the past two days. 24 Q. Okay. Did you meet with anyone 25 other than counsel to prepare for the</p>
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<p>1 GRIFFITH 2 deposition? 3 A. Just my personal team. 4 Q. And who is that? 5 A. John Boffi and Nick Weber. 6 Q. And did you meet with them with 7 counsel present or separately? 8 A. Both. 9 Q. Okay. And did you review any 10 documents? 11 A. Yes. 12 Q. And which ones? 13 A. Both of my declarations, the expert 14 reports that were filed, the replies that were 15 filed and our motion for the 507(b). 16 Q. Okay. And you say you read the 17 expert reports. 18 Did you read the documents that 19 were -- the experts said that they relied on? 20 A. I can't say for sure. I don't 21 believe I did look at all documents. And I'm 22 sure there were other documents I looked at, 23 but those were the ones I could recall. 24 Q. And have you ever been qualified as 25 an expert to testify in court?</p>	<p>1 GRIFFITH 2 A. I served as a witness for a plan of 3 reorganization once before. 4 Q. And what was your role as the 5 witness? What was the general topic of your 6 testimony? 7 A. Plan feasibility. 8 Q. And that was the only time you ever 9 testified in court -- 10 A. Yes. 11 MR. GENENDER: Let him finish his 12 question. 13 A. Yes. 14 Q. So I take it you've never testified 15 or offered an opinion in a case where a section 16 507(b) claim is justified? 17 A. I have not. 18 Q. I take it you have never testified 19 or offered an opinion in a case as to whether a 20 surcharge under section 506 is justified; is 21 that correct? 22 A. I have not. 23 Q. Have you authored any publications 24 in the last ten years? 25 A. No.</p>

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1 GRIFFITH  
2 Q. Do you have any professional  
3 licenses?  
4 A. I do not.  
5 Q. Do you have any legal training?  
6 A. I do not.  
7 Q. Do you have any accounting training?  
8 A. I mean, I took accounting classes in  
9 college, but no technical training.  
10 Q. In what areas, if any, do you  
11 consider yourself to be an expert?  
12 MR. GENENDER: Object to the form.  
13 A. I'm not sure I would call myself an  
14 expert in any area. I have been in the  
15 financial field for 20 years, but I'm not sure  
16 that I would qualify as an expert.  
17 Q. I would like to show you what's been  
18 marked as Exhibit 1 for identification, which  
19 you have before you, which is the stipulation  
20 and order concerning the resolution of certain  
21 section 507(b) claims.  
22 A. Okay.  
23 Q. And have you seen this document  
24 before?  
25 A. (Document review.)

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1 GRIFFITH  
2 debtors.  
3 Q. When you say "we," who do you mean  
4 by "we"?  
5 A. We, as in M-III Partners.  
6 Q. And what specifically do you do in  
7 that connection?  
8 A. I have taken on various roles over  
9 the course of the engagement, mainly around  
10 treasury and cash flow functions.  
11 Q. And who do you report to, if anyone?  
12 A. I report to Mo Meghji.  
13 Q. And who is he?  
14 A. He is the senior partner of M-III  
15 Partners.  
16 Q. Does he have a title? Is he the  
17 chief restructuring officer of the debtor as  
18 well?  
19 A. He is.  
20 Q. Now, are you appearing today as a  
21 fact witness or an expert witness or both?  
22 A. I would say a fact witness.  
23 Q. Okay. I would like to show you what  
24 we have marked for identification as Exhibit 3.  
25 Can you look at that document,

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1 GRIFFITH  
2 I have.  
3 Q. Okay. If you look at paragraph 1,  
4 you understand the debtors' request for  
5 estimation has been withdrawn?  
6 A. I see that.  
7 Q. You don't dispute that, do you?  
8 A. I don't think I have a reason to.  
9 Q. Okay. And so you are here to  
10 testify on the issues of the 507(b) claim and  
11 the 506(c) surcharge; is that correct?  
12 A. Yes.  
13 Q. Anything else?  
14 A. Not that I'm aware of, no.  
15 Q. Okay. I would like to show you the  
16 notice of deposition which we have marked for  
17 identification as Exhibit 2, and you are here  
18 pursuant to this notice, correct?  
19 A. (Document review.) Yes.  
20 Q. Now, you are here -- you're  
21 appearing today on behalf of the debtors; is  
22 that correct?  
23 A. Correct.  
24 Q. And what do you do for the debtors?  
25 A. We are the financial advisors to the

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1 GRIFFITH  
2 please?  
3 A. (Document review.)  
4 Q. And were you aware that there was a  
5 document request that was served on the company  
6 to produce certain documents in connection with  
7 this litigation?  
8 A. Yes.  
9 Q. Did you play any role in gathering  
10 the documents in response to that request?  
11 A. My team gathered most of the  
12 documents. Not me specifically.  
13 Q. And did you review the documents  
14 that were produced?  
15 A. I can't say with certainty that I  
16 have looked at every document that was  
17 produced.  
18 Q. But generally?  
19 A. I've looked at them, yes.  
20 MR. MOLONEY: Okay. I would like to  
21 mark for identification, as Exhibit 4,  
22 your initial declaration in this matter,  
23 and as Exhibit 5 your supplemental  
24 declaration.  
25 Q. Do you have copies of those before



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1                    GRIFFITH

2     you?

3         A.   I do.

4         Q.   And just looking at it, are these

5     true and correct copies of these declarations

6     on your behalf?

7         A.   (Document review.)

8             Yes, this appears to be both.

9         Q.   Okay. Now, looking at Exhibit 5 for

10    identification, and looking specifically at

11    page 6, do you see a chart with certain

12    numbers?

13         A.   Yes.

14         Q.   As you sit here today, do you intend

15    to change any of those numbers in connection

16    with your testimony at the trial in this

17    matter?

18         A.   I don't believe so.

19         Q.   Okay. And do these two declarations

20    contain all the opinions you intend to --

21    include all -- do you believe they contain any

22    opinions, these declarations? Let me start

23    with that question.

24             MR. GENENDER: Objection, form.

25         A.   I do believe we reached some

Page 23

1                    GRIFFITH

2     working on a declaration providing that

3     information?

4             MR. GENENDER: I'm going to object

5     and instruct you not to reveal

6     communications with counsel.

7             You can answer it without

8     revealing --

9             MR. MOLONEY: I think he's an

10    expert. I don't think you can insert

11    that, but go ahead.

12             MR. GENENDER: An expert? That's my

13    objection. That's my instruction.

14         A.   I will listen to counsel.

15         Q.   Okay. So you are not answering the

16    question?

17         A.   I am not.

18         Q.   Is it because it would reveal

19    attorney/client communication?

20         A.   It could, yes.

21         Q.   Okay. Besides potentially giving an

22    opinion on diminution that occurred post sale

23    closing, if any, were there any other opinions

24    that you expect you might give related to this

25    case?

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1                    GRIFFITH

2     opinions based on the facts, our assumptions.

3         Q.   Do they contain all the opinions you

4     intend to give in this case?

5             MR. GENENDER: Objection, form.

6         A.   Not necessarily.

7         Q.   What additional opinions do you

8     expect to give?

9         A.   There is a potential, if necessary,

10    to provide a follow-on declaration related to

11    any type of potential diminution post closing

12    of the sale through a confirmation date.

13         Q.   Are you working on that document

14    now?

15         A.   Not currently, no.

16         Q.   Have you worked on a document that

17    would be a declaration on that topic?

18         A.   Not as of today, no.

19         Q.   Is your team working on that?

20         A.   Not currently, no.

21         Q.   Do you anticipate you will be

22    working on a document dealing with that topic?

23             MR. GENENDER: Objection, form.

24         A.   It's possible.

25         Q.   Have you been told that you will be

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1                    GRIFFITH

2         A.   As I sit here today, I'm not aware

3    of any.

4         Q.   Okay. I would like you to take a

5    look at Exhibit 6 for identification.

6             Is this one of the documents you

7    looked at, our reply brief, you said?

8             MR. GENENDER: Objection, form.

9         A.   Yes.

10         Q.   So did you see this chart in our

11    reply brief?

12         A.   I don't have that brief in front of

13    me, I don't believe.

14         Q.   Okay. But you don't recall it?

15         A.   It may. It may not. I don't know.

16         Q.   Okay. We will go through it

17    together. This is just a demonstrative. So

18    it's not a document that you produced.

19         A.   Uh-huh.

20         Q.   It's a document we created, just so

21    you know, okay?

22         A.   Yep.

23         Q.   Okay. If you look at the -- it's

24    basically an attempt by us to compare where you

25    and ESL's expert, David Schulte --

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1 GRIFFITH  
2 (Phone interruption.)  
3 Q. -- might differ. And I would like  
4 to start by looking at the inventory book  
5 value. And the way we read your reports, you  
6 and Mr. Schulte actually agree on that same  
7 starting number; is that correct?  
8 MR. GENENDER: Objection, form.  
9 A. I'd have to go and compare to my  
10 deposition, because this is not something I  
11 prepared.  
12 Q. You can look at your report at any  
13 time. So look at your report to see whether  
14 your number is right.  
15 I will represent to you this is  
16 Schulte's number.  
17 MR. GENENDER: Objection, form.  
18 A. And this is from which --  
19 Q. It's from your second declaration or  
20 your first declaration. Your first  
21 declaration, actually, I think would be easiest  
22 for you to find it. It will be Exhibit 4.  
23 A. I believe that was updated in --  
24 Q. That's why I'm saying look at either  
25 declaration.

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1 GRIFFITH  
2 Q. You can answer the question as to  
3 can you not figure out what value you put on --  
4 book value of opening inventory by looking at  
5 your two reports?  
6 MR. GENENDER: Objection, form.  
7 A. Well, my report has it as total  
8 gross collateral. It does not show it as  
9 inventory.  
10 Q. Okay. That's your supplemental  
11 report. Your initial report, take a look at  
12 Exhibit A of your initial report.  
13 You see you have a separate line  
14 item for inventory book value?  
15 A. Yep.  
16 Q. Did you change that number to come  
17 up with the new total in your supplemental  
18 report?  
19 MR. GENENDER: Object to the form.  
20 You're referring to his  
21 declarations?  
22 MR. MOLONEY: Yeah.  
23 MR. GENENDER: You keep saying  
24 report. I assume you mean his  
25 declarations.

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1 GRIFFITH  
2 A. So I'll look at the supplemental.  
3 Q. Look at page 6 of the supplemental.  
4 That's where you have these numbers.  
5 A. (Document review.)  
6 MR. GENENDER: Who created  
7 Exhibit 6?  
8 MR. MOLONEY: I did.  
9 MR. GENENDER: I thought you said  
10 earlier -- you represented earlier it was  
11 part of your brief.  
12 MR. MOLONEY: Correct.  
13 MR. GENENDER: This exact Exhibit 6  
14 was an exhibit to your brief?  
15 MR. MOLONEY: It's in the brief.  
16 MR. GENENDER: It says, "Expert  
17 worksheet draft."  
18 MR. MOLONEY: It's essentially --  
19 the substance is in the brief. It's not  
20 relevant. I just wanted the witness to  
21 know that he didn't create it.  
22 MR. GENENDER: I just want to know  
23 what it is. I think that's fair, isn't  
24 it?  
25 BY MR. MOLONEY:

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1 GRIFFITH  
2 MR. MOLONEY: Correct.  
3 MR. GENENDER: Thank you.  
4 A. I did not.  
5 Q. So it's correct that you and  
6 Mr. Schulte both agree on the same starting  
7 number for inventory book value; is that  
8 correct?  
9 A. Yes.  
10 Q. Okay. And can you tell me where you  
11 got your number?  
12 A. From -- I believe it's the borrowing  
13 base that was in place at the time.  
14 Q. Okay. And is the number in the  
15 borrowing base based on the schedule that the  
16 debtor provided?  
17 MR. GENENDER: Objection, form.  
18 A. Yes.  
19 Q. Okay. So the ultimate source of  
20 that information is the schedule, correct?  
21 MR. GENENDER: Objection to form.  
22 A. Which schedule?  
23 Q. The schedule that was provided to  
24 the debtors -- to the banks pursuant to the  
25 borrowing base from the debtor, correct?

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1 GRIFFITH  
2 A. I believe so.  
3 MR. GENENDER: Objection, form.  
4 Q. And you indicated -- there's a  
5 difference, you can see, between the total  
6 collateral value in your first declaration and  
7 the total collateral value in your second  
8 declaration, correct?  
9 MR. GENENDER: Objection, form.  
10 A. Yes.  
11 Q. So please explain to me, what  
12 adjustment did you make to the total gross  
13 collateral in your supplemental report to  
14 produce a different number than you had for the  
15 total gross collateral in your initial report?  
16 MR. GENENDER: Objection, form.  
17 You mean declarations?  
18 MR. MOLONEY: Declarations.  
19 MR. GENENDER: Thank you.  
20 A. I believe we removed the pharmacy  
21 receivables from the credit card receivables or  
22 accounts receivable.  
23 Q. Okay. Before you filed your initial  
24 declaration, was this reviewed by counsel?  
25 MR. GENENDER: Objection.

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1 GRIFFITH  
2 counsel to your initial declaration, yes or no?  
3 MR. GENENDER: Objection to the  
4 form.  
5 A. Yes.  
6 Q. Were there changes to this  
7 information that's contained in the box on  
8 page 6 of your initial report based on  
9 information -- or based on what you were told  
10 by counsel, yes or no?  
11 DI MR. GENENDER: Objection, form. I'm  
12 instructing you not to answer on the  
13 ground of privilege.  
14 Q. Okay. And where did you source the  
15 \$7 million number that you used in your initial  
16 report?  
17 MR. GENENDER: Objection, form.  
18 Q. Initial declaration.  
19 MR. GENENDER: Objection, form.  
20 A. I don't recall off the top of my  
21 head where it was from. It may have been the  
22 borrowing base.  
23 Q. Why did you initially include the  
24 pharmacy receivables in your initial  
25 declaration?

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1 GRIFFITH  
2 Q. Just answer yes or no.  
3 MR. GENENDER: Objection, form.  
4 A. The initial declaration?  
5 Q. Yes.  
6 A. Did I file it without counsel?  
7 Q. Was it reviewed by counsel before it  
8 was finalized?  
9 MR. GENENDER: Objection, form.  
10 Q. Just answer yes or no.  
11 A. Yes.  
12 Q. Okay. And was it reviewed by your  
13 team before it was finalized?  
14 A. Yes.  
15 Q. And did counsel make any changes to  
16 the declaration or was everything in the  
17 declaration your work product? I'm talking  
18 about the initial declaration.  
19 MR. GENENDER: Objection, form. I'm  
20 going to instruct you in answering not to  
21 reveal any privileged communications.  
22 Q. Just say yes or no.  
23 A. Have there been changes from the  
24 initial draft?  
25 Q. Was there changes dictated by

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1 GRIFFITH  
2 A. They are part of the first lien  
3 collateral package. They would be in the  
4 borrowing base.  
5 Q. Did you include all of the first  
6 lien collateral package in your initial  
7 declaration?  
8 A. I don't believe so.  
9 Q. How did you decide what portions of  
10 the first lien collateral package to include  
11 and what portions to omit in your initial  
12 declaration?  
13 A. We were attempting to show  
14 collateral here that would also be collateral  
15 of the second lien.  
16 Q. Okay. So you initially believed the  
17 pharmacy receivables were collateral for the  
18 second lien; is that correct?  
19 MR. GENENDER: Objection, misstates  
20 the testimony.  
21 A. No, it's not correct.  
22 Q. Okay. What explanation do you have  
23 for why you initially included it?  
24 MR. GENENDER: Objection, asked and  
25 answered.

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1 GRIFFITH  
2 A. It was included in accounts  
3 receivable, but it should have been broken out  
4 separately as credit card receivables.  
5 Q. Do you feel qualified to determine  
6 on your own whether or not it's part of the  
7 second lien collateral?  
8 A. I can offer my opinion.  
9 Q. I know you could offer your opinion,  
10 but do you feel qualified to make that legal  
11 judgment?  
12 MR. GENENDER: Objection, form,  
13 calls for legal conclusion.  
14 A. Yeah, I can't make a legal  
15 conclusion.  
16 Q. Okay. Have you ever had, as part of  
17 your business, had to make judgments as to  
18 whether certain assets qualified as collateral  
19 under a security agreement?  
20 A. I can offer my opinions, yes.  
21 Q. And when you make those opinions, do  
22 you consult with lawyers?  
23 A. It's possible.  
24 Q. Did you consult with lawyers in this  
25 case before you offered your opinion as to what

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1 GRIFFITH  
2 was first and second lien collateral in your  
3 initial declaration?  
4 DI MR. GENENDER: Objection, form. I'm  
5 going to instruct you not to answer based  
6 on the grounds he is requesting privileged  
7 information again.  
8 Q. At footnote 6 of your supplemental  
9 declaration -- could you look at footnote 6 of  
10 your supplemental declaration, which is  
11 Exhibit 5 for deposition? And that appears on  
12 page 5 of your supplemental declaration.  
13 Are you with me?  
14 A. I am.  
15 Q. You refer to the fact that section  
16 10.9 of APA requires delivery of an aggregate  
17 of 1.65 billion of acquired inventory, credit  
18 card accounts receivable and pharmacy  
19 receivables (which includes the pharmacy  
20 scripts.)  
21 Did I read that correctly?  
22 MR. GENENDER: No.  
23 Q. You may answer.  
24 A. Could you restate that?  
25 Q. Let me save the reporter having to

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1 GRIFFITH  
2 do this.  
3 Why did you not include pharmacy  
4 script along with pharmacy receivables in your  
5 initial declaration?  
6 MR. GENENDER: Objection, form.  
7 A. I don't believe they were part of  
8 the borrowing base, the pharmacy scripts.  
9 Q. Exhibit A of your initial  
10 declaration, is it fair to say that it  
11 represents a snapshot of the first lien and  
12 second lien collateral potentially available to  
13 satisfy a second lien debt as of the petition  
14 date?  
15 A. No.  
16 Q. In what sense does it not?  
17 A. Exhibit A still had the pharmacy  
18 receivables in it.  
19 Q. Okay. With that caveat would you  
20 say this was a snapshot as of the petition date  
21 of the first and second liens debt and of the  
22 collateral that would be available to satisfy  
23 the second lien debt?  
24 MR. GENENDER: Objection, form.  
25 A. I believe so, with that caveat.

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1 GRIFFITH  
2 Q. Okay. Now, there's no inclusion of  
3 any post petition interest that might have  
4 accrued in the future to the first lien debt in  
5 your initial declaration; is that correct?  
6 A. In the initial declaration, that's  
7 correct.  
8 Q. And if you had felt it was  
9 appropriate to include that item in your  
10 initial declaration, you would have included  
11 it, correct?  
12 A. We state in the initial declaration  
13 that we were using Cyrus values from the  
14 initial Cyrus offer. We reserve rights to make  
15 changes. We reviewed it and we made changes in  
16 this supplemental.  
17 Q. As of the petition date, there was  
18 no post petition interest that was due and  
19 owing to any secured creditor, correct?  
20 A. That's correct.  
21 Q. Okay. Let's look at the chart on  
22 your supplemental declaration.  
23 You're not going to blame Cyrus for  
24 any of the inputs on this chart, are you?  
25 MR. GENENDER: Objection,

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1 GRIFFITH  
2 argumentative.  
3 You don't have to answer that. It's  
4 not a question.  
5 MR. MOLONEY: It is.  
6 Q. You may answer.  
7 MR. GENENDER: It's not a serious  
8 question.  
9 A. No. I'm not looking to blame  
10 anybody.  
11 Q. Okay. So whose idea was it to take  
12 out the pharmacy receivables in the chart that  
13 appears at page 6 of your supplemental  
14 declaration?  
15 A. I don't recall. It was probably a  
16 member of my team.  
17 Q. You don't know who instructed you to  
18 do that?  
19 MR. GENENDER: Objection, asked and  
20 answered.  
21 A. I wasn't instructed. It was upon  
22 further diligence.  
23 Q. It wasn't your decision. You didn't  
24 come up with the idea, I take it?  
25 MR. GENENDER: Objection to form,

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1 GRIFFITH  
2 Objection, form, assumes facts not  
3 in evidence, and misstates the record.  
4 A. Could you restate the question?  
5 Q. Sure. Before agreeing to the  
6 change, which was the omission of the pharmacy  
7 receivables from your revised chart that  
8 appears at page 6 of your supplemental  
9 declaration, I asked what, if any, diligence  
10 did you do to ensure the original inclusion of  
11 the pharmacy receivables was not actually the  
12 correct treatment?  
13 MR. GENENDER: Objection, misstates  
14 the record, assumes facts not in evidence.  
15 A. I'm still not sure I'm following the  
16 question.  
17 Are you asking about the original or  
18 the adjustment?  
19 Q. When you made the change, what did  
20 you do to make sure that the change was  
21 correct, if anything?  
22 A. We reviewed the detail of the  
23 accounts receivable and the credit card  
24 receivable between -- the breakdown between  
25 that and the pharmacy receivable from the

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1 GRIFFITH  
2 misstates the evidence.  
3 A. We were reviewing all of the  
4 figures, and this was one of the issues that  
5 came up.  
6 Q. No, but it wasn't your idea to take  
7 out that number. You said it was a member of  
8 your team.  
9 Was that an incorrect statement?  
10 You can correct the record if it was incorrect.  
11 MR. GENENDER: Objection, compound,  
12 vague.  
13 A. Somebody may have identified it. It  
14 may have been my instruction to take it out.  
15 Q. And you don't know who that person  
16 was?  
17 A. I can't recall, no.  
18 Q. Okay. Before agreeing to that  
19 change, what, if any, diligence did you  
20 personally do to ensure your original inclusion  
21 of the pharmacy receivable is not correct?  
22 MR. GENENDER: Objection, form.  
23 He's going really fast. So take  
24 your time in answering. He's speaking  
25 really fast.

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1 GRIFFITH  
2 detail provided by the company.  
3 Q. Did you look at the security  
4 agreements for the second lien creditors?  
5 A. We have looked at the security  
6 agreements for the second lien creditors, yes.  
7 Q. Do you know that they have a  
8 security interest in inventory?  
9 MR. GENENDER: Objection, form.  
10 A. Yes.  
11 Q. And that inventory includes pharmacy  
12 inventory, correct?  
13 MR. GENENDER: Objection, misstates  
14 the record.  
15 A. I can't say for sure.  
16 Q. You don't know?  
17 MR. GENENDER: Objection to form.  
18 A. About the pharmacy receivable, I  
19 don't know.  
20 MR. GENENDER: Document speaks for  
21 itself.  
22 A. Or inventory, you're saying, I would  
23 assume it does.  
24 Q. And assuming it does include  
25 pharmacy inventory, why wouldn't pharmacy

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1 GRIFFITH  
2 receivables be the proceeds of pharmacy  
3 inventory?  
4 MR. GENENDER: Objection, assumes  
5 facts not in evidence, misstates the  
6 record.  
7 Q. You may answer.  
8 A. In the first lien credit agreement,  
9 they lay out the fact that pharmacy receivables  
10 are a piece of their collateral as a separate  
11 item. The second lien does not. So we  
12 excluded it.  
13 MO MR. MOLONEY: Okay. I move to  
14 strike that.  
15 Can you read back my question,  
16 please?  
17 (Record read.)  
18 MR. GENENDER: Same objection, asked  
19 and answered.  
20 A. Yeah. I did not see pharmacy  
21 receivables listed as a piece of the  
22 collateral.  
23 Q. Are you familiar with the concept of  
24 what proceeds -- account proceeds are defined  
25 under the Uniform Commercial Code of the State

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1 GRIFFITH  
2 of the second lien collateral in your second --  
3 in your supplemental declaration, correct?  
4 MR. GENENDER: Objection, form.  
5 What is footnote 1 on there?  
6 A. Yeah. There is no footnote. What's  
7 the footnote for?  
8 Q. I didn't say a footnote.  
9 MR. GENENDER: Next to your  
10 Exhibit 6, there's a footnote next to that  
11 figure.  
12 MR. MOLONEY: I have no idea why it  
13 is there. And I apologize. It shouldn't  
14 be there, but, in any event, ignore the  
15 footnote.  
16 A. Okay. What was the question?  
17 Q. Let me ask it again.  
18 You attribute a value of  
19 \$54.8 million there to receivables remaining a  
20 part as the -- in your supplemental  
21 declaration, correct?  
22 A. Yes.  
23 Q. And you see Mr. Schulte has a value  
24 of 64.2?  
25 A. I do.

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1 GRIFFITH  
2 of New York?  
3 MR. GENENDER: Objection, form,  
4 calls for a legal conclusion.  
5 A. Yeah. And I would have to see it,  
6 but I can't say that I do.  
7 Q. Okay. So you really didn't -- this  
8 was a judgment made by somebody else, not by  
9 you or by your team, correct?  
10 MR. GENENDER: Objection, misstates  
11 the record, misstates his testimony.  
12 A. Yeah, I would say no to that.  
13 Q. Okay. You made it without knowing  
14 whether or not our agreements actually covered  
15 the collateral? You just took it out?  
16 MR. GENENDER: Objection, compound,  
17 misstates the record.  
18 A. I explained why we made the change.  
19 Q. Okay. You attribute a value of  
20 54 -- going back to Exhibit 6 again.  
21 Do you have that in front of you  
22 still?  
23 A. I do.  
24 Q. You attribute a value of  
25 \$54.8 million in receivables remaining a part

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1 GRIFFITH  
2 Q. Do you have an understanding as to  
3 why you and Mr. Schulte might have come up with  
4 different numbers?  
5 A. I don't know the source of his  
6 number.  
7 Q. Okay. Can you tell us what the  
8 source is for your number?  
9 A. Like I said, I believe it was from  
10 the borrowing base that was in effect at the  
11 time.  
12 Q. And you are relying on a forecast  
13 number, right?  
14 MR. GENENDER: Objection, form.  
15 A. Borrowing base is not a forecast.  
16 Q. But this particular number is based  
17 on a forecast, isn't it?  
18 MR. GENENDER: Objection, form.  
19 A. I don't believe so.  
20 Q. How do you think -- you think this  
21 number is based on a schedule from the debtors?  
22 A. I believe it's from the borrowing  
23 base.  
24 Q. But where -- how do the lenders  
25 compute this number under the borrowing base?



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1 GRIFFITH

2 A. The company computes the number

3 under the borrowing base.

4 Q. And do you know how it's done?

5 A. They pull, from their general

6 ledger, the balances.

7 Q. You think this is a general ledger

8 number?

9 A. I can't say for sure.

10 Q. Would you think that the general

11 ledger number would be the correct number?

12 A. I would think the borrowing base

13 would be the correct number.

14 Q. Why would the borrowing base be a

15 better number than the general ledger if the

16 borrowing base was based on the general ledger?

17 MR. GENENDER: Objection, form.

18 A. There may be adjustments that need

19 to be taken out of an accounting system. I'm

20 not a hundred percent sure.

21 Q. If that's the number that's in the

22 debtors' schedule, 64.2, if that's the number

23 in the debtors' schedule, is that the correct

24 number?

25 MR. GENENDER: Objection, form,

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1 GRIFFITH

2 MR. GENENDER: I'm going to object.

3 There's no \$54.2 million number.

4 Q. \$54.8 million number.

5 MR. GENENDER: Object to the form of

6 the question, misstates the record.

7 Q. You don't know where it comes from?

8 A. I don't believe it's a forecast.

9 Q. Okay. But you don't have a source?

10 MR. GENENDER: Objection, misstates

11 the record.

12 A. Again, I believe it's from the

13 borrowing base.

14 Q. If Schulte used the ledger, the

15 general ledger, and he used the debtors'

16 numbers from the debtors' own schedules filed

17 with the court, is it your view that that was

18 inappropriate by him?

19 MR. GENENDER: Objection, assumes

20 facts not in evidence.

21 A. I'm not sure if he's pulling the

22 right numbers if it's not coming from the

23 borrowing base. There may be additional

24 accounting journal entries or accounts that

25 need to be contemplated. I don't know.

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1 GRIFFITH

2 asked and answered.

3 A. I don't believe so. I mean, like I

4 said, it should be from the borrowing base.

5 Q. The borrowing base, by definition,

6 could have certain assets that the lender is

7 not going to be willing to lend against but

8 could, nevertheless, qualify as our inventory,

9 correct?

10 MR. GENENDER: Objection, form.

11 A. I'm not sure I follow the question.

12 Q. You understand that the borrowing

13 base is a contractual arrangement between the

14 banks and the debtor as to what terms they are

15 going to advance credit?

16 A. Yes.

17 Q. And they don't have to necessarily

18 advance credit on a hundred percent of the

19 value of the assets that are available to them

20 as collateral, correct?

21 A. Yes.

22 Q. So you don't know where this

23 \$54.2 million number is, but I will tell you I

24 believe it could be a forecast, but you don't

25 know one way or the other; is that correct?

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1 GRIFFITH

2 Q. Who suggested that you add in

3 \$34 million on page 6 of your chart in your

4 supplemental declaration that was not contained

5 in Exhibit A to your initial declaration?

6 MR. GENENDER: Objection, assumes

7 facts not in evidence and instruct you not

8 to reveal any communications with counsel

9 on the grounds of privilege.

10 Q. Can you answer the question?

11 A. I'm agreeing with counsel.

12 MR. GENENDER: Excuse me. You can

13 answer -- you can answer the question if,

14 in doing so, you don't reveal

15 communications with counsel.

16 THE WITNESS: Okay.

17 Q. Can you answer the question?

18 MR. GENENDER: Subject to that

19 instruction.

20 A. As I said before, we went back and

21 did additional diligence. And it was an issue

22 that was raised. I don't recall who raised it,

23 but it was something that we decided did make

24 sense to include, given the fact that there

25 would be some level of post petition senior

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1 GRIFFITH  
2 interest that would be incurred.  
3 Q. But by including that number, you no  
4 longer are showing a snapshot as of the  
5 petition date, right?  
6 A. That's correct.  
7 Q. You don't think you are mixing  
8 apples and oranges?  
9 MR. GENENDER: Objection, form.  
10 A. This is our view of what we thought  
11 the maximum amount would be available for  
12 second lienholders.  
13 Q. That \$34 million number is not an  
14 actual -- it's not based on actual payments  
15 made by the debtors, correct?  
16 A. That's correct.  
17 Q. What is the actual amount, if any,  
18 that the debtors paid?  
19 A. I'm not sure I follow the question.  
20 Q. What amount, if any, did the debtors  
21 actually pay in post petition interest in that  
22 three-month period?  
23 A. Well in excess of 34 million.  
24 Q. What number?  
25 A. I don't have it off the top of my

Page 51

1 GRIFFITH  
2 Q. Did you feel that was an unreliable  
3 accounting record of the debtors?  
4 MR. GENENDER: Objection, form.  
5 A. We rely on the borrowing base  
6 certificate.  
7 Q. Other than the borrowing base, what  
8 other sources did you look at for the  
9 information contained either in your initial  
10 declaration in Exhibit A or in your  
11 supplemental declaration on page 6 in the  
12 table?  
13 MR. GENENDER: Objection, asked and  
14 answered.  
15 A. There's multiple sources for the  
16 data analysis that we pulled together.  
17 Q. Okay. Name them, please.  
18 A. The treasury systems would give us  
19 the expenses.  
20 Q. Any others?  
21 A. Not that I can think of sitting here  
22 today.  
23 Q. Okay. The treasury system, does  
24 that feed into the general ledger?  
25 A. I'm not -- I don't know a hundred

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1 GRIFFITH  
2 head.  
3 Q. Why did you pick this number rather  
4 than the actual number?  
5 A. This was a hypothetical number based  
6 on the bare minimum we expected to incur.  
7 Q. Okay. In paragraph 6 of your  
8 supplemental declaration, you say, "Each of the  
9 reports rely on incorrect or misapplied data  
10 taken from other sources," correct?  
11 A. Yes.  
12 Q. And when you say "from other  
13 sources," what are you referring to?  
14 A. Saying other sources other than what  
15 we had used.  
16 Q. And I take it, did you use any  
17 source other than the borrowing base?  
18 A. For what figures?  
19 Q. For any figures.  
20 A. We have a lot of figures in our  
21 analysis, including expenses, which would not  
22 be considered part of the borrowing base.  
23 Q. Did you -- for some of your numbers,  
24 did you look at the general ledger?  
25 A. I don't believe so.

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1 GRIFFITH  
2 percent how they feed together.  
3 Q. You wouldn't be surprised if the  
4 general ledger fed into the treasury system,  
5 would you?  
6 MR. GENENDER: Objection, calls for  
7 speculation.  
8 Q. As a financial person, wouldn't you  
9 expect that?  
10 A. It's quite possible, yes.  
11 Q. Okay. Now, what, if any, misapplied  
12 data do you claim Schulte relied on?  
13 A. I don't believe he should be using  
14 book value, is one instance, for his collateral  
15 value.  
16 Q. Any other?  
17 A. I would have to go through his  
18 report, if we want to go take a look. But,  
19 also, he did not include the L/C facilities,  
20 which we believe should be included.  
21 I disagree with the 95.5 percent  
22 book value of GOB inventory. Those are the  
23 couple I can think of sitting here, in addition  
24 to the fact that he is including collateral  
25 values that we do not believe are part of the

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1 GRIFFITH

2 2L collateral.

3 Q. Just to close the loop, specifically

4 as to Mr. Schulte, what, if any, inappropriate

5 sources do you claim that he relied on for his

6 conclusions?

7 MR. GENENDER: Objection, asked and

8 answered.

9 A. I mean, credit card receivables, I

10 don't recognize that number. And the GOB

11 valuations, I'm not sure I understand those.

12 Q. Okay.

13 A. There may be more.

14 MR. GENENDER: When you get to a

15 point we can take a break --

16 MR. MOLONEY: I will ask one more

17 question about that last item, then we

18 will take a break.

19 MR. GENENDER: You bet. Thank you.

20 Q. If you look at your supplemental

21 exhibit, look at Exhibit A, and you go to

22 page 5 of 35 of Exhibit A.

23 To be clear, Exhibit A is the

24 borrowing base, correct?

25 MR. GENENDER: As of the date

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1 GRIFFITH

2 A. (Document review.)

3 The date of the certificate is

4 October 13. The dates and the totals of these

5 columns is also October 13. I don't believe

6 that that's a forecast as of that date.

7 Q. It says, doesn't it, credit card

8 forecast.

9 MR. GENENDER: Hang on a second.

10 Tom, he needs to be able to finish

11 his answer. You kind of cut him off.

12 MR. MOLONEY: I didn't mean to.

13 MR. GENENDER: I know.

14 A. I'm saying that the date has

15 actually occurred. I don't understand how that

16 would be a forecast.

17 I can't say, looking at this, that

18 the label is accurate.

19 Q. It says, "Based on forecasted

20 totals." Do you see that, where it says

21 millions on the third line under the red, which

22 is credit card receivables, treasury, cash

23 flow, inflow forecast?

24 A. Okay. I see it.

25 Q. And that doesn't cause you to change

Page 54

1 GRIFFITH

2 reflected on it?

3 MR. MOLONEY: Yes.

4 A. (Document review.) Yes.

5 Q. If you look under credit card

6 receivables.

7 MR. GENENDER: Which page are you

8 on?

9 Q. It's that page. It's the last of

10 the columns -- I'm sorry, the print is tiny --

11 but it's in red. It says, "Credit card

12 receivables, treasury, cash flow, inflow

13 forecast."

14 MR. GENENDER: I want to make sure

15 the witness is on the right page.

16 MR. MOLONEY: It's page 5 of 35.

17 A. I am on that page. I see it.

18 Q. Okay. And the number you're relying

19 on, 54.6, is, in fact, based on a forecast; is

20 that not correct?

21 MR. GENENDER: 54.8?

22 Q. 54.8.

23 MR. GENENDER: Objection, misstates

24 the record.

25 Q. You may answer.

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1 GRIFFITH

2 your opinion?

3 A. I don't know of the accuracy of that

4 title.

5 Q. Okay. And if you go to page 16 of

6 35, if you look under the line credit card

7 deposits in transit.

8 A. Okay.

9 Q. And if you look at those numbers, if

10 you add them up, they represent the number that

11 Mr. Schulte is relying on.

12 MR. GENENDER: Objection, form.

13 A. Okay.

14 Q. If he sourced his number from the

15 borrowing base document, the one that -- this

16 line, other than the other section, what

17 criticism, if any, do you have of his choice of

18 sources?

19 MR. GENENDER: Objection, assumes

20 facts not in evidence, misstates the

21 record.

22 A. This is as of October 6, which is a

23 full week before the borrowing base.

24 MR. MOLONEY: We can take a break.

25 MR. GENENDER: Thank you.

1 GRIFFITH  
2 (Recess taken at 2:59 p.m. to  
3 3:11 p.m.)  
4 BY MR. MOLONEY:  
5 Q. Could you look at the document in  
6 front of you that's marked Exhibit 9 for  
7 identification?  
8 MR. FOX: Which is 9?  
9 MR. MOLONEY: For the record, it's  
10 Exhibit G. It's Joint Exhibit 14. I  
11 believe it was one of the joint exhibits  
12 at the sale hearing.  
13 Q. It says -- under that, it says,  
14 "Transform Transaction - Weekly Tracking."  
15 Mr. Griffith, am I correct that you  
16 are familiar with documents like this one,  
17 which are administrative solvency trackers?  
18 MR. GENENDER: Objection, form.  
19 A. Yes.  
20 Q. And did you ever prepare documents  
21 like this one?  
22 A. I have.  
23 Q. And if we look at this particular  
24 document, there's a discussion on page 4 at the  
25 top, about -- there's a category called "RX

1 GRIFFITH  
2 Scripts."  
3 Do you see that?  
4 A. I do.  
5 Q. And does that refer to pharmacy  
6 scripts?  
7 A. It does.  
8 Q. And there's a project, and you're  
9 listed as one of the responsible parties which  
10 is script appraisal; is that correct?  
11 A. Yes.  
12 Q. And there's an identified  
13 opportunity.  
14 What does that represent?  
15 A. I believe a potential benefit to the  
16 borrowing base.  
17 Q. And at that point in time, the  
18 company was able to borrow, based on the  
19 script, \$7.50, is that correct, per script?  
20 A. No, no.  
21 Q. What is the comment, "Current  
22 borrowing base of 7.50/script resulting in  
23 \$25 million of availability"? What is that  
24 based on? What does that mean?  
25 MR. GENENDER: Objection, form.

1 GRIFFITH  
2 A. I believe that was related to the  
3 credit agreement being negotiated for Transform  
4 that would allow them to borrow against the  
5 scripts.  
6 Q. Okay. And the idea was to try to  
7 come up with a better appraisal of the script;  
8 is that correct?  
9 MR. GENENDER: Objection, form,  
10 misstates the evidence.  
11 A. We were just running this down, I  
12 believe. Tiger was doing an appraisal for  
13 NewCo.  
14 Q. And were you working with them?  
15 A. We were just waiting for the results  
16 of it.  
17 Q. So when it says you're the  
18 responsible party, all you were responsible for  
19 was waiting for the results of somebody else's  
20 work? Is that what you're telling us?  
21 MR. GENENDER: Objection, misstates  
22 his testimony.  
23 A. Yeah. We were supposed to wait for  
24 the results, review it and include it for  
25 potential liquidity enhancement.

1 GRIFFITH  
2 Q. Okay. Could you look at what we  
3 have marked for identification as Exhibit 7?  
4 Can you identify for us what this document is?  
5 A. (Document review.)  
6 It says it's an estimated script  
7 asset value.  
8 Q. And who put this together?  
9 A. I do not know.  
10 Q. Did you -- this is one of the  
11 documents that was produced by your team,  
12 right, in response to your document request; is  
13 that correct?  
14 A. It is possible.  
15 Q. The Bates stamp numbers are numbers  
16 that were put on by your client, in fact, when  
17 they produced documents to us in response to  
18 the document request; isn't that correct?  
19 A. I mean, I can't confirm it by just  
20 looking at these numbers at the bottom, but --  
21 Q. I will represent to you it is one of  
22 the documents produced by your team.  
23 So did you not try to understand  
24 what the document was that you were producing?  
25 MR. GENENDER: Objection, form.

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1 GRIFFITH  
2 argumentative.  
3 A. I believe we were trying to provide  
4 every document that we had that could  
5 potentially be helpful or something that we  
6 would have looked at at some point.  
7 Q. Okay. And at the filing date, the  
8 company had approximately 140 stores, is that  
9 correct, that sold pharmacy script?  
10 MR. GENENDER: Objection, form.  
11 A. I don't know that off the top of my  
12 head.  
13 Q. Even though you're responsible for  
14 pharmacy script, that's not a number you know?  
15 MR. GENENDER: Objection, form,  
16 misstates the record.  
17 A. I don't.  
18 Q. Do you have any reason to believe  
19 that's not the correct number?  
20 A. I mean, this file doesn't have a  
21 date or a title on it. I'm not exactly sure  
22 what this is supposed to be representing.  
23 Q. Well, it was produced to us in  
24 response to a request for information about the  
25 value of the pharmacy script as of petition

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1 GRIFFITH  
2 date. So you tell me what it's supposed to be  
3 representing.  
4 MR. GENENDER: Objection, form,  
5 misstates the evidence, assumes facts not  
6 in evidence.  
7 Q. You may answer.  
8 A. Multiple documents were provided, I  
9 think, to allow parties to understand what the  
10 potential value was.  
11 Q. And this was one of them. And  
12 you're saying that you made no effort to find  
13 out what it meant or who produced it?  
14 MR. GENENDER: Objection, compound,  
15 misstates the record.  
16 A. It's not the document that we relied  
17 on, no.  
18 Q. You also made no effort to find out  
19 who produced it or what it meant?  
20 MR. GENENDER: Objection, misstates  
21 the testimony.  
22 A. Given the level of detail included,  
23 I don't think we put much reliance on this  
24 document.  
25 Q. Well, the detail, it lists every

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1 GRIFFITH  
2 single location with the store, right?  
3 MR. GENENDER: Objection, form.  
4 A. It appears to, yeah.  
5 Q. It has an estimated asset value for  
6 each -- for the pharmacy script at each store,  
7 correct?  
8 A. As of what date, I don't know.  
9 Q. Well, that's what I'm asking you.  
10 MR. GENENDER: Objection, form.  
11 There's no question there.  
12 Q. As of the date when there was 140  
13 stores still operating, which is as of the  
14 petition date, right?  
15 MR. GENENDER: Objection, form,  
16 assumes facts not in evidence.  
17 A. Yeah, I can't confirm that.  
18 Q. Assuming that we will be able to  
19 prove at trial that there were 140 stores  
20 selling pharmacy receivables at the petition  
21 date, and I represent to you we will, do you  
22 have any reason to believe this does not  
23 represent the value of the pharmacy script as  
24 of the petition date?  
25 MR. GENENDER: Objection, assumes

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1 GRIFFITH  
2 facts not in evidence, lack of foundation,  
3 calls for speculation.  
4 A. Given there is no date on here, I  
5 can't tell you as of what date this would have  
6 been.  
7 Q. Okay. Putting aside -- assume, for  
8 purposes of my question, that the date is as of  
9 the filing date, petition date, can you tell me  
10 any reason why the number, \$72 million --  
11 \$72,804,891 is not an appropriate estimated  
12 script asset value for pharmacy receivables?  
13 MR. GENENDER: Objection, lack of  
14 foundation, calls for speculation and  
15 assumes facts not in evidence.  
16 A. Yeah, I can't tell you from this  
17 document that that's necessarily the case.  
18 Q. But you can't tell me it's not the  
19 case either, right?  
20 MR. GENENDER: Same objections.  
21 A. We have a valuation done by  
22 professionals that we have relied on, not this  
23 spreadsheet.  
24 Q. And what document did -- is that the  
25 one that you are looking to have redone as of

Page 65

1 GRIFFITH  
2 1/25/19?  
3 MR. GENENDER: Objection to form.  
4 A. We have the appraisal from Tiger, [REDACTED]  
5 and Tiger was doing an update of the appraisal.  
6 Q. Okay. We've marked Exhibit Number  
7 10 for identification, if you look at that.  
8 Does this represent the updated  
9 appraisal?  
10 A. It's the appraisal as of February 4.  
11 Q. And, in fact, if you go to page 13,  
12 you will see there's a valuation put of \$10.08  
13 per script; is that correct?  
14 MR. GENENDER: Objection, form.  
15 A. That's what it says.  
16 Q. Any reason to believe that that  
17 number is not correct?  
18 A. No.  
19 Q. And that only deals with 89  
20 pharmacies, correct?  
21 A. (Document review.)  
22 Yes, that's what it says.  
23 Q. And are you aware that at or after  
24 the filing, debtor closed 51 pharmacies?  
25 A. I'm sorry. Can you repeat the

Page 66

1 GRIFFITH  
2 question?  
3 Q. Are you aware that at or after the  
4 filing of the chapter 11 petition, the debtor  
5 closed 51 pharmacies?  
6 A. It's possible. I don't know for  
7 sure.  
8 Q. If you look at Bates stamp number  
9 12 -- let's see. Where is the first one --  
10 okay. 1276 -- actually, you can start at 1275.  
11 A. Okay.  
12 Q. You see that's a summary of what we  
13 have just been talking about, 89 pharmacies,  
14 correct?  
15 A. I see that.  
16 Q. You have 3,640,000 scripts and the  
17 price, estimated value is 36,690,000 for that  
18 number of scripts; is that right?  
19 MR. GENENDER: Objection, form,  
20 misstates the record.  
21 A. It appears to.  
22 Q. Okay. And then you look at the  
23 backup, and you see the backup has locations  
24 which are the same -- some of which are the  
25 same location numbers that appeared on

Page 67

1 GRIFFITH  
2 Exhibit 7, correct?  
3 MR. GENENDER: Objection, form.  
4 Q. So, for example, the first one, if  
5 you look at 3021, we can find that at the  
6 bottom of Exhibit 7, right?  
7 A. What number are you referring to?  
8 Q. It's the first number on 1276, which  
9 is 3021, location 1276. If we look at the last  
10 page of Exhibit 7, and we look at the one, two,  
11 three, four, five, fifth entry from the bottom  
12 you see the same store.  
13 MR. GENENDER: Fifth from the  
14 bottom, 3317?  
15 MR. MOLONEY: 3021. One, two,  
16 three, four, five, six.  
17 MR. GENENDER: Exactly.  
18 Q. Sixth one up from the bottom, you  
19 see the same store, correct?  
20 MR. GENENDER: Objection to form.  
21 A. Uh-huh.  
22 Q. If you look at the valuation, the  
23 valuation they have here for 3201 is a low  
24 value of 200,000 and a high value of 225, and a  
25 mid value of approximately 213 and 3021 has a

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1 GRIFFITH  
2 valuation of 224, which is closer to the high  
3 number, right?  
4 MR. GENENDER: You said 3201 and  
5 3021 in that same question. Object to the  
6 form.  
7 Q. 3021 has a value of -- looking  
8 across, has a value of 224,903 in Exhibit 7.  
9 And in Exhibit 10, it has valuations that range  
10 from 202,000 to 225, right?  
11 A. (Document review.)  
12 MR. GENENDER: Objection, form. The  
13 document speaks for itself.  
14 A. I see it, yeah.  
15 Q. Did you study these documents at any  
16 point in time?  
17 A. I reviewed the documents. I  
18 wouldn't say I've studied them.  
19 Q. Okay. And this Tiger value, is this  
20 the value at that time debtor used of \$10.08  
21 when it delivered pharmacy receivables to  
22 satisfy its minimum delivery obligation under  
23 the APA?  
24 MR. GENENDER: Objection, form.  
25 A. (Document review.)



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1 GRIFFITH  
2 Q. If you look at Exhibit 8, which is  
3 in your pile --  
4 MR. GENENDER: If you let him --  
5 MR. MOLONEY: If you look at  
6 Exhibit 8, it will help him, but okay.  
7 MR. GENENDER: There's no question  
8 on the floor.  
9 Do you have a new question?  
10 MR. MOLONEY: I asked him to look at  
11 Exhibit 8. He looked at his own  
12 declaration, but that doesn't help him. I  
13 knew it wouldn't. I'm trying to help him  
14 by looking at Exhibit 8.  
15 MR. GENENDER: How about if you ask  
16 him questions instead of trying to help  
17 him?  
18 MR. MOLONEY: I asked him to look at  
19 Exhibit 8.  
20 MR. GENENDER: 8?  
21 MR. MOLONEY: 8.  
22 MR. GENENDER: Okay. Look at  
23 Exhibit 8 and wait for a question.  
24 Q. Have you seen this letter before?  
25 A. I'm sorry. Exhibit 8. This is 9.

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1 GRIFFITH  
2 Q. Exhibit 8.  
3 A. (Document review.) Yes.  
4 Q. Okay. And if you look at the  
5 document which is attached to the letter, which  
6 is the satisfaction of conditions to close, do  
7 you see that?  
8 A. I do.  
9 Q. Did your group prepare this?  
10 A. Yes.  
11 Q. Okay. Now, looking at -- it says,  
12 "Pharmacy receivables of \$10 million and  
13 pharmacy script value of \$37 million per Tiger  
14 appraisal issued 2/4/19."  
15 Did I read that correctly?  
16 A. Yes.  
17 Q. Does that mean that you used the  
18 price of \$10.08 per pharmacy script in order to  
19 satisfy your obligations -- the company's  
20 obligations to meet the minimum delivery  
21 requirements under the APA?  
22 A. It would appear so.  
23 MR. GENENDER: Objection, form,  
24 calls for a legal conclusion.  
25 Q. You believe that's the correct

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1 GRIFFITH  
2 number to use for the value of the pharmacy  
3 scripts as of petition date?  
4 MR. GENENDER: Objection, form,  
5 misstates the evidence.  
6 A. As of the close date, I would say  
7 yes.  
8 Q. But not as of the petition date,  
9 because the close date is a different date and  
10 time, right?  
11 A. That's right.  
12 Q. Now, going back again to Exhibit 6.  
13 You did not include cash, unrestricted cash in  
14 your collateral values, correct?  
15 A. Could you say that again?  
16 Q. You did not include the debtors'  
17 unrestricted cash in your gross collateral  
18 value, correct?  
19 A. That's correct.  
20 Q. And putting aside whether or not  
21 that was a correct decision on your part, do  
22 you agree that the amount of cash that was  
23 unrestricted that the debtor had as of the  
24 petition date was \$115.5 million?  
25 MR. GENENDER: Objection, form.

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1 GRIFFITH  
2 A. I don't know the source. I can't  
3 say I can confirm that.  
4 Q. Assume that the general ledger  
5 reflects that amount. Would you have any  
6 quarrel?  
7 MR. GENENDER: Objection, form,  
8 assumes facts not in evidence.  
9 A. What was the question about the  
10 cash?  
11 Q. I said assuming the general ledger  
12 reflected that there was \$115.5 million of  
13 unrestricted cash as of petition date, would  
14 you have any quarrel with Mr. Schulte relying  
15 on that source for that piece of information?  
16 MR. GENENDER: Objection to form,  
17 assumes facts not in evidence.  
18 A. I would. I would have a problem.  
19 Q. Which would be what?  
20 A. One, I don't believe it's part of  
21 the collateral package for the 2Ls.  
22 And, two, I don't know if that cash  
23 relates to unencumbered assets or inventory and  
24 accounts receivable monetizations.  
25 MO MR. MOLONEY: I move to strike that

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1 GRIFFITH  
2 answer.  
3 Q. My question is, not asking about  
4 whether or not it's part of the collateral  
5 package. I'm asking you about the number and  
6 whether this represents unrestricted cash that  
7 the debtor had as of petition date.  
8 MR. GENENDER: Objection.  
9 Q. And with that question in mind,  
10 assuming Mr. Schulte sourced his information  
11 from the general ledger, do you have any  
12 quarrel with him using that source?  
13 MR. GENENDER: Objection, form.  
14 Objection, form, asked and answered.  
15 A. I do.  
16 MR. GENENDER: You can answer one  
17 more time.  
18 Q. You may answer.  
19 A. I would have a problem with that,  
20 yes.  
21 Q. Which is what?  
22 MR. GENENDER: Objection, form,  
23 asked and answered.  
24 A. I don't know if that's cash that's  
25 related to unencumbered asset sales or

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1 GRIFFITH  
2 certain categories that may be treated as cash  
3 that are not technically cash. They are  
4 treated as cash for an accounting perspective,  
5 but may not actually be depository accounts.  
6 Q. Assuming they are depository  
7 accounts, would you have any other quarrel?  
8 MR. GENENDER: Objection, form, lack  
9 of foundation, calls for speculation.  
10 A. Yeah, I don't know. I would still  
11 have a problem.  
12 Q. How about if the debtor's statement  
13 of affairs said that's the amount of cash they  
14 had as of petition date, would you have a  
15 problem with that, too?  
16 MR. GENENDER: Objection, form.  
17 A. I still would.  
18 Q. And why is that?  
19 A. I don't know if it relates to  
20 encumbered assets or unencumbered assets in  
21 terms of the monetizations.  
22 Q. I'm not talking about whether it's  
23 encumbered or not. I'm just talking about the  
24 number.  
25 Assuming the number that the debtor

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1 GRIFFITH  
2 potentially inventory and accounts receivable  
3 monetization.  
4 Q. You understand I'm not asking you  
5 that question as to whether or not it relates  
6 to any of those things. I'm asking you whether  
7 there's unrestricted cash that the debtor had  
8 as of the petition date in the amount of  
9 \$115.5 million. I'm not asking you any  
10 question at all whether somebody has a  
11 collateral position or not.  
12 I just want to know if the number is  
13 correct.  
14 MR. GENENDER: Objection, form,  
15 asked and answered.  
16 A. I can't tell you from this schedule  
17 if that's correct.  
18 Q. And I'm asking if you wanted to just  
19 get the number, do you have any quarrel with  
20 looking at the general ledger as a source for  
21 just the number?  
22 MR. GENENDER: Objection, form.  
23 A. I may, yes.  
24 Q. You may. And why may you?  
25 A. In the general ledger, there are

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1 GRIFFITH  
2 listed in their schedule for unrestricted cash  
3 was 115.5, do you have a problem with accessing  
4 that source for the number?  
5 MR. GENENDER: Objection, asked and  
6 answered.  
7 A. I'm not sure. It would seem  
8 reasonable, but I would have to look at the  
9 information.  
10 Q. Now, paragraph 16 of your  
11 declaration. Do you have it in front of you?  
12 MR. GENENDER: Which declaration?  
13 MR. MOLONEY: Supplemental  
14 declaration, Exhibit 5 for identification.  
15 A. What page?  
16 Q. Page 10, paragraph 16. Did you  
17 write paragraph 16?  
18 A. (Document review.) Yes.  
19 Q. And am I correct that, in paragraph  
20 16, you say that the Murray report's assumption  
21 that "cash reflects proceeds from the sale of  
22 inventory and the collection of receivables"  
23 may be a reasonable assumption.  
24 Is that correct?  
25 MR. GENENDER: Objection, misstates

1 GRIFFITH  
2 the document.  
3 A. (Document review.)  
4 I mean, I think they are two  
5 separate sentences with the punctuation, but  
6 it's not saying -- there's more to this second  
7 sentence that would put it in context.  
8 Q. Didn't you say that it may be a  
9 reasonable assumption to assume that cash  
10 reflects proceeds from the sale of inventory  
11 and the collection of receivables?  
12 MR. GENENDER: Objection, misstates  
13 the document, misstates the evidence.  
14 A. Yeah, that's not how those two  
15 sentences read in whole.  
16 Q. Okay. In what sense have I  
17 misrepresented your sentence?  
18 A. The second sentence that starts,  
19 "While that may be a reasonable assumption,  
20 cash is not collateral of the second  
21 lienholder."  
22 Q. Okay. And if it is the proceeds  
23 from the sale of inventory and the collection  
24 of receivables, is it your view it doesn't  
25 matter whether that's true or not or whether or

1 GRIFFITH  
2 not it's our collateral?  
3 MR. GENENDER: Objection, compound  
4 and lack of foundation.  
5 A. I think the point is that once it is  
6 considered cash, there could be issues with the  
7 UCC.  
8 Q. What issues?  
9 A. They would argue that it's not your  
10 collateral at that point.  
11 Q. Why?  
12 A. Because the cash and deposit  
13 accounts were not listed as 2L collateral.  
14 Q. Where?  
15 A. In the security agreement.  
16 Q. Any other reason?  
17 A. No. I think that would be the  
18 reason. Nothing else I can think of.  
19 Q. Can you think of any other method  
20 that cash would have been generated and be  
21 available in that amount, \$115.5 million, as of  
22 the petition date in unrestricted debtor  
23 accounts other than as a result of the sale of  
24 inventory and the collection of receivables?  
25 MR. GENENDER: Objection, form, lack

1 GRIFFITH  
2 of foundation.  
3 A. I would have to speculate on that.  
4 I don't know.  
5 Q. Even if it's not the proceeds of  
6 second lien collateral, it would still be the  
7 first lien collateral, correct?  
8 A. Yes.  
9 Q. And you say in your report --  
10 A. Sorry. Let me clarify that. It  
11 would be as long as the cash related to sale of  
12 assets that are covered by their collateral  
13 package.  
14 Q. You say in your report that the  
15 "cash would likely be tied up in escrow by  
16 request of the Official Committee of Unsecured  
17 Creditors in a liquidation, making it  
18 unavailable to satisfy second lien debt."  
19 Do you see that sentence?  
20 A. Where are we?  
21 Q. Same paragraph, paragraph 16.  
22 A. Okay.  
23 Q. On what basis do you claim that the  
24 UCC would be allowed to prevent first lien or  
25 second lien creditors from accessing such

1 GRIFFITH  
2 collateral by requiring it be placed in escrow?  
3 A. If the first lien debt was fully  
4 satisfied by inventory and accounts receivable  
5 proceeds, cash was left in a cash account, I  
6 think the UCC would have a problem not  
7 distributing that or assuming that that's 2L  
8 collateral.  
9 Q. And what do you base that on?  
10 A. The fact that we don't believe that  
11 the cash deposit accounts were part of the 2L  
12 collateral.  
13 Q. Anything else?  
14 A. That's all I can think of as of now.  
15 Q. Is that what you had in mind when  
16 you wrote that sentence?  
17 A. Yes.  
18 Q. Okay. Let's talk about the  
19 inventory receivable.  
20 You value that at 85 percent of book  
21 value, is that correct, looking at our  
22 worksheet, Exhibit 6 again?  
23 MR. GENENDER: Object to the  
24 characterization of our worksheet number.  
25 MR. MOLONEY: Looking at my

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1 GRIFFITH  
2 worksheet. I said our worksheet, which is  
3 the good guys' worksheet. Go ahead.  
4 MR. GENENDER: I agree that it  
5 apparently is yours. I don't know that I  
6 agree with the second characterization.  
7 A. Yes, 85 percent of book.  
8 Q. And in your declaration -- I think  
9 there's a footnote in your supplemental  
10 declaration on page 5, footnote 6, which refers  
11 to section 10.9 of the APA, right?  
12 A. Okay.  
13 Q. And then looking at the text, the  
14 way I read paragraph 7, but you tell me if I'm  
15 misreading it, you're basing your opinion based  
16 on your reading of the APA, right, that the  
17 85 percent value is the value assigned by the  
18 APA; is that correct?  
19 A. Yes.  
20 Q. Okay. Apart from your reading of  
21 the APA, do you have any other basis to say  
22 that the collateral is worth 85 percent of book  
23 value?  
24 A. Yes.  
25 Q. And what is your other basis?

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1 GRIFFITH  
2 Q. Would you look at -- is this the APA  
3 that you're referring to?  
4 A. Yes.  
5 Q. And would you look at section 13.4?  
6 MR. GENENDER: What section?  
7 MR. MOLONEY: 13.4.  
8 Q. It's on page 109. Do you have it in  
9 front of you?  
10 A. I do.  
11 Q. Do you see it's called "Entire  
12 Agreement"?  
13 A. Yes.  
14 Q. Are you familiar with entire  
15 agreement provisions?  
16 MR. GENENDER: Objection, form,  
17 calls for legal conclusion.  
18 A. Yeah. I wouldn't say that I have  
19 a -- not extremely familiar, no.  
20 Q. It says that, "The agreement  
21 (including the schedules any exhibits),  
22 confidentiality agreement and the other  
23 transaction documents contain all of the terms,  
24 conditions and representations and warranties  
25 agreed to by the parties related to the subject

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1 GRIFFITH  
2 A. All of the deal negotiations that  
3 had been taking place since accepting the ESL  
4 bid contemplated 85 cents on the dollar for the  
5 inventory and accounts receivable.  
6 Q. Apart from the APA and what you  
7 claim the deal negotiations reveal, do you have  
8 any other basis for relying on the 85 percent  
9 number?  
10 A. Not that I can think of. Those are  
11 the main reasons that we are assuming the 85  
12 percent.  
13 Q. Not that you can think of. Not that  
14 you put in your report, right?  
15 A. I did not put anything else in the  
16 report, that's right.  
17 Q. And you didn't even mention the deal  
18 negotiations in your report, correct?  
19 A. I assumed the APA was a little more  
20 powerful. But, yes, that's right.  
21 Q. Okay. You're right about the APA  
22 being more powerful, but would you look at  
23 Exhibit 14 in your pile.  
24 MR. GENENDER: Object to the  
25 sidebar.

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1 GRIFFITH  
2 matter of this agreement and supersede all  
3 prior and contemporaneous agreements,  
4 understandings, negotiations, correspondence,  
5 undertakings and communications of the parties  
6 or the representatives, oral or written,  
7 respecting such subject matter."  
8 Do you see that?  
9 A. I do.  
10 Q. Do you have any -- putting aside the  
11 APA, are you relying on anything that is not  
12 picked up within the category of  
13 understandings, negotiations, correspondence,  
14 undertakings and communications of the parties  
15 or their representatives, oral or written,  
16 respecting the subject matter of this  
17 agreement?  
18 MR. GENENDER: Objection, calls for  
19 legal conclusion.  
20 A. I'm just relying on the fact that we  
21 understand the buildup of the cash that's in  
22 here, cash consideration, and how that relates  
23 to the inventory and accounts receivable.  
24 Q. Based on what?  
25 A. Based on the components of the cash

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1 GRIFFITH  
2 that's being offered of the 4085. Let me get  
3 the exact number. (Document review.) The  
4 billion four oh eight four hundred and fifty  
5 thousand.  
6 Q. Okay. Now, looking at section 1 and  
7 look particular at page 3, do you see the  
8 definition of acquired assets, which is the  
9 second item down?  
10 A. I do.  
11 Q. It says, "Shall have the meaning set  
12 forth in section 2.1."  
13 Do you see that?  
14 A. Yes.  
15 Q. Did I read that correctly?  
16 A. Yep.  
17 Q. And going ahead to purchase price,  
18 which is on page 27. "Purchase price shall  
19 have the meaning set forth in section 3.1,"  
20 correct?  
21 A. Yes.  
22 Q. Let's turn to 3.1, please, which is  
23 on page 51.  
24 A. Yes.  
25 Q. And are you there? It says, "The

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1 GRIFFITH  
2 Q. I was trying to figure out how many  
3 of the eight categories are considerations of  
4 cash, and you indicated that -- you corrected  
5 me that there are two.  
6 A. There's more than two.  
7 Q. Okay. What else -- oh, yeah,  
8 there's more.  
9 What other ones are cash?  
10 A. In which section?  
11 Q. A is a cash calculation, right? You  
12 start out with one number, and you add a  
13 number, and you subtract a number, right? And  
14 that gets you -- you end up with a final number  
15 under A, right?  
16 A. (Document review.)  
17 Q. Come on. You're now telling me that  
18 for A --  
19 MR. GENENDER: Hang on a second.  
20 You've got to let him answer your  
21 questions without berating him. I don't  
22 care what kind of hurry you're in. You've  
23 got to let him answer the question. He's  
24 under oath. I object.  
25 MR. MOLONEY: This was the basis of

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1 GRIFFITH  
2 aggregate purchase price for the purchase,  
3 sale, assignment and conveyance of seller's  
4 right, title and interest in, to and under the  
5 acquired assets," and that's capitalized, again  
6 right?  
7 A. Yes.  
8 Q. "Shall consist of the following,"  
9 and it says, in parens, "Collectively, the  
10 purchase price," right?  
11 Did I read that properly?  
12 A. You did.  
13 Q. And collectively there are seven  
14 items of consideration listed under 3.1,  
15 correct?  
16 A. Yes.  
17 Q. A to G, and only A is a cash number,  
18 right?  
19 A. No.  
20 Q. No. You're right. There's more  
21 than one cash number. C is a cash number, too,  
22 right?  
23 A. Yes.  
24 Q. Two of them are cash numbers.  
25 A. I'm sorry. What number did you say?

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1 GRIFFITH  
2 his supposed opinion.  
3 MR. GENENDER: There's no question.  
4 MR. MOLONEY: I would have thought  
5 he would have studied this provision  
6 before.  
7 MR. GENENDER: I would have thought  
8 you would have asked better questions than  
9 that.  
10 There's no question on the floor.  
11 Ask a question. It's outrageous.  
12 BY MR. MOLONEY:  
13 Q. A is a calculation to come up with a  
14 cash number. It starts out with one number,  
15 plus another number, plus a third number, and  
16 then minus some numbers, correct?  
17 MR. GENENDER: Objection, the  
18 document speaks for itself.  
19 A. (Document review.)  
20 It says then less.  
21 Q. That's what I'm saying.  
22 A. So then you're reducing. (Document  
23 review.)  
24 I believe the cash consideration is  
25 basically the first three under A, romanette i,

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1 GRIFFITH  
2 romanette ii, romanette iii.  
3 Q. And that cash number is then  
4 reduced --  
5 MR. GENENDER: Are you done with  
6 your answer?  
7 THE WITNESS: I believe so.  
8 Q. Isn't that cash number reduced by  
9 Roman Numeral IV?  
10 MR. GENENDER: Objection, calls for  
11 a legal conclusion, the document speaks  
12 for itself.  
13 A. It appears that way.  
14 Q. Okay. So the number -- the final  
15 numbers could be less than 1408. So how does  
16 it relate to anything in terms of 10.9?  
17 A. The components of the billion four  
18 oh eight four five oh were made up of the  
19 850 million outstanding under the DIP,  
20 125 million of the FILO term loan, which was  
21 also a senior facility, as well as the  
22 433.45 million credit bid.  
23 Q. Okay. So you take that number and  
24 then additional consideration is listed in  
25 paragraph C, right? Cash in the amount of the

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1 GRIFFITH  
2 outstanding obligations owed to lenders other  
3 than the borrower or its affiliates. It goes  
4 on to -- right?  
5 That's in addition to the purchase  
6 price includes, not only A, but also includes  
7 C, and also includes B, includes consideration  
8 in D, E, F and G, right?  
9 MR. GENENDER: Objection, the  
10 document speaks for itself, confusing --  
11 and confusing.  
12 MR. MOLONEY: No, it isn't.  
13 MR. GENENDER: It's  
14 incomprehensible.  
15 A. Section 3.1 is the purchase price.  
16 Q. And that total amount comes to  
17 approximately \$5.2 billion if you add up the  
18 value under all these different items, correct?  
19 MR. GENENDER: Objection, form.  
20 A. I haven't added all of these up, but  
21 I would presume that's the case.  
22 Q. Don't you know that -- didn't your  
23 company provide an opinion to the court that  
24 the total aggregate value was about  
25 \$5.2 billion?

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1 GRIFFITH  
2 MR. GENENDER: Objection to form.  
3 A. I personally did not. I mean, it  
4 sounds correct, but I can't sit here and say I  
5 know that for sure.  
6 Q. You believe that that's  
7 approximately correct, if not exactly right,  
8 right?  
9 A. It could be.  
10 Q. And that \$5.2 billion in total is  
11 the collective purchase price, right?  
12 MR. GENENDER: Objection, form,  
13 document speaks for itself.  
14 A. Yeah. Can you point me to that  
15 number?  
16 Q. Well, the purchase price is the list  
17 of all of these items. And we know from the  
18 sales hearing that you quantified them as a  
19 total of \$5.2 billion or someone on behalf of  
20 M-III qualified it at that level. I believe  
21 Mr. Meghji may have. I don't know.  
22 MR. GENENDER: Objection, compound.  
23 A. I just don't see a number in C that  
24 I could actually compute to get there.  
25 Q. You don't need a number.

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1 GRIFFITH  
2 You agree that the purchase price is  
3 collectively whatever number is garnered by  
4 adding the consideration provided in A, to the  
5 consideration provided in B, to the  
6 consideration provided in C, to the  
7 consideration provided in D, to the  
8 consideration provided in E, to the  
9 consideration provided in F, to the  
10 consideration provided in G?  
11 A. If those are all the sections of  
12 section 3.1 under purchase price, I would agree  
13 with that.  
14 Q. So for all of that consideration,  
15 what you get are the acquired assets, right?  
16 MR. GENENDER: Objection, form, the  
17 document speaks for itself.  
18 A. Yes.  
19 Q. Look at --  
20 MR. GENENDER: Objection, form,  
21 document speaks for itself.  
22 Q. Well, you recall that acquired  
23 assets was a defined term in what appears in  
24 2.1. So can we look at 2.1?  
25 MR. GENENDER: Objection, asked and



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1 GRIFFITH  
2 answered.  
3 Q. It's on page 35.  
4 MR. GENENDER: The definition of  
5 acquired assets is not on page 35.  
6 MR. MOLONEY: No. The definition of  
7 acquired assets is section 2.1, and  
8 section 2.1 is on page 35.  
9 Q. Correct?  
10 A. Yes.  
11 Q. And looking at 2.1, 2.1 lists, by my  
12 count, 29 categories of assets that are  
13 acquired for the aggregate purchase price of  
14 \$5.2 billion or for aggregate purchase price of  
15 whatever is put in -- whatever 3.1 provides,  
16 right?  
17 MR. GENENDER: Objection, the  
18 document speaks for itself, calls for a  
19 legal conclusion.  
20 A. It appears that way, yes.  
21 Q. And among those 29 categories of  
22 assets, there's one category, category D,  
23 that's called "All Acquired Inventory, All  
24 Acquired Receivables, All Acquired Equipment  
25 and All Acquired Improvements."

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1 GRIFFITH  
2 Q. You tell me where, in section 2.1,  
3 you believe that the inventory and receivables  
4 that constitute our lien collateral are being  
5 purchased by Transform.  
6 A. I would agree it's a portion of D.  
7 Q. Okay. So it's a portion. So would  
8 you agree with me, looking at this agreement,  
9 that this agreement does not allocate any  
10 separate price for the inventory?  
11 MR. GENENDER: Objection, the  
12 document speaks for itself, calls for a  
13 legal conclusion.  
14 A. (Document review.)  
15 It does not appear to have something  
16 specific just to inventory.  
17 Q. And it doesn't have anything  
18 specific as to receivables either, right?  
19 MR. GENENDER: Objection to form,  
20 the document speaks for itself, calls for  
21 a legal conclusion.  
22 A. Yes, I would agree.  
23 Q. Now, would you look at Exhibit 12?  
24 And this is -- for the record, it's a document  
25 that was, I think, a joint Exhibit 46 at the

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1 GRIFFITH  
2 Do you see that category?  
3 A. Yes.  
4 Q. And within that category is the  
5 inventories and receivables that represents the  
6 2L collateral, correct?  
7 MR. GENENDER: Objection, the  
8 document speaks for itself.  
9 A. I'd have to read the definitions.  
10 Q. You can look at the definitions of  
11 acquired inventory. We will do it together.  
12 It will be in the front, and it will be on  
13 page 3.  
14 A. (Document review.)  
15 I'm not sure I understand romanette  
16 iii in acquired inventory.  
17 Q. Okay. You tell me where, in 2.1,  
18 you think that our collateral is picked up.  
19 MR. GENENDER: Objection, form, the  
20 document --  
21 Q. Take your time and look at it.  
22 MR. GENENDER: Objection, form, the  
23 document speaks for itself, calls for a  
24 legal conclusion.  
25 A. Could you repeat the question?

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1 GRIFFITH  
2 sale hearing, and it's a copy of a document,  
3 the UCC, I believe, offered into evidence as  
4 Exhibit 2.  
5 Do you recognize this document?  
6 A. I don't recall this one  
7 specifically.  
8 Q. Do you recognize this as being the  
9 bid letter made by Transform?  
10 A. (Document review.)  
11 It appears to be a bid letter from  
12 Transform.  
13 Q. If you look at paragraph 5, you see  
14 there's an allocation of the proposed  
15 consideration in the bid letter?  
16 A. I see it.  
17 Q. And it says, "The allocation of  
18 proposed consideration to each category of  
19 purchased asset (including the inventory and  
20 receivables, real estate, intellectual property  
21 and ground lease collateral, and the  
22 unencumbered assets) is set forth under item 2  
23 above."  
24 Is that correct?  
25 A. That's what it says, yes.

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1 GRIFFITH  
2 Q. Again, look at item 2 above. It  
3 says, under "Consideration; Other Value," it  
4 says, "The total purchase price for our going  
5 concern proposal would provide approximately  
6 \$4.4 billion in total consideration to Sears  
7 based on information provided by the debtors.  
8 This consideration would comprise," and then it  
9 lists various items.  
10 Do you see that?  
11 A. I do.  
12 Q. Is there any specific separate  
13 allocation of money for inventory in this  
14 paragraph?  
15 MR. GENENDER: Objection, form, the  
16 document speaks for itself.  
17 A. I mean, they talk about the credit  
18 bid, the acquired inventory and receivables,  
19 and they have cash amounts under an ABL that  
20 would be secured against the inventory and  
21 receivables.  
22 Q. There's nothing in paragraph 2 that  
23 allocates a specific consideration to the  
24 inventory or to the receivables, correct?  
25 MR. GENENDER: Objection, form, the

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1 GRIFFITH  
2 what the reason was for these.  
3 Q. You really don't remember the reason  
4 why the ESL bid was rejected?  
5 MR. GENENDER: Objection, form,  
6 misstates the testimony.  
7 A. I don't know if their consideration  
8 has changed during this period. We would have  
9 to go through it to look.  
10 Q. Are you telling us you don't  
11 recall --  
12 MR. GENENDER: Did you finish your  
13 answer?  
14 Q. Did you finish your answer?  
15 MR. GENENDER: Please don't cut the  
16 witness off.  
17 MR. MOLONEY: I didn't mean to.  
18 MR. GENENDER: It has happened  
19 several times.  
20 Q. Are you done?  
21 A. I am done with my answer, yes.  
22 Q. Are you telling us that you don't  
23 know that the reason why the ESL bid was  
24 originally rejected and why they were not  
25 provided a stalking horse protection was

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1 GRIFFITH  
2 document speaks for itself.  
3 A. I don't see it there, no.  
4 Q. Okay. Look at Exhibit 13. Looking  
5 at Exhibit 13, do you recognize this document?  
6 A. (Document review.)  
7 I believe I've seen this, yes.  
8 Q. And this is the amended Transform  
9 bid; is that correct?  
10 A. It appears to be, yes.  
11 Q. And do you see anything in this  
12 document that constitutes an assignment of any  
13 specific value for the inventory or  
14 receivables?  
15 MR. GENENDER: Objection, the  
16 document speaks for itself.  
17 A. (Document review.)  
18 I wouldn't say directly, no.  
19 Q. And weren't these two bids by ESL  
20 rejected as non-conforming because they did not  
21 allocate value to specific collateral?  
22 MR. GENENDER: Objection, form.  
23 A. I don't recall why they were or were  
24 not rejected. There were multiple reasons for  
25 multiple bids being rejected. I don't know

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1 GRIFFITH  
2 because they did not allocate the consideration  
3 in their bid?  
4 MR. GENENDER: Objection, form, lack  
5 of foundation.  
6 A. Initial bids were rejected because  
7 they lacked enough value for the estate. I  
8 don't know why these were particularly. That  
9 could be the reason.  
10 Q. You don't know for a fact that  
11 that's the reason?  
12 A. I don't know.  
13 Q. Do you know if someone told ESL that  
14 was the reason their bid was being rejected?  
15 MR. GENENDER: Objection, calls for  
16 speculation.  
17 A. I wasn't a part of the  
18 conversations. I don't know.  
19 Q. In any event, prior to the deal  
20 being accepted, did Transform ever modify its  
21 offer to allocate the consideration it was  
22 offering?  
23 A. Could you repeat the question?  
24 MR. GENENDER: Objection, form, lack  
25 of foundation.

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1 GRIFFITH  
2 Q. Prior to the Transform deal being  
3 accepted by the debtor and approved by the  
4 court, did Transform ever modify these bid  
5 letters, to your knowledge, to indicate that  
6 they were specifically allocating values to  
7 specific items of the debtors' property?  
8 A. I don't know for certain, no.  
9 Q. Are you aware that the debtors  
10 waived the allocation requirement?  
11 A. Yes, I believe they did.  
12 Q. Why was that necessary?  
13 MR. GENENDER: Objection, form, lack  
14 of foundation, calls for a legal  
15 conclusion.  
16 A. Yeah, I'm not a hundred percent sure  
17 on the legal part of it.  
18 Q. What was your understanding of why  
19 they were waiving the allocation requirement?  
20 MR. GENENDER: Objection, lack of  
21 foundation.  
22 A. Yeah, as I said, I don't know the  
23 exact reason.  
24 Q. Were you aware the debtors  
25 represented to the court that our bid was not,

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1 GRIFFITH  
2 "our" meaning Transform's bid, was not  
3 allocated?  
4 MR. GENENDER: Objection, form.  
5 A. It sounds familiar, yes.  
6 Q. Do you think that they were lying?  
7 A. I would not think so.  
8 Q. Okay. Didn't ESL make a number of  
9 improvements in its offer as it moved up  
10 through this process up until its final offer  
11 being accepted?  
12 A. I believe so, yes.  
13 Q. And in connection with those  
14 improvements, didn't it become difficult to try  
15 to figure out an allocation between the  
16 improved consideration and what was being  
17 bought?  
18 MR. GENENDER: Objection, form.  
19 A. I mean, the components of the cash  
20 piece, I think, were pretty straightforward.  
21 The rest of it, I don't know.  
22 Q. Now, in any event, whatever value  
23 ESL put on the property would have been as of  
24 the closing date, not as of the petition date,  
25 right?

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1 GRIFFITH  
2 MR. GENENDER: Objection, form, lack  
3 of foundation, vague.  
4 A. Could you say that again?  
5 Q. Well, whatever value Transform might  
6 have placed on the collateral -- inventory  
7 collateral, if any, in its offer under the bid  
8 letters or under the APA, would have related to  
9 the closing date, not the petition date, right?  
10 A. That's correct.  
11 Q. And based on your earlier testimony,  
12 therefore, it's irrelevant to our dispute,  
13 right?  
14 MR. GENENDER: Objection, form,  
15 misstates the testimony.  
16 A. I don't understand the question.  
17 Q. Well, do you recall telling me that  
18 the pharmacy script prices you used to close  
19 the transaction were irrelevant because they  
20 were done as of the closing date and not as of  
21 petition date?  
22 MR. GENENDER: Objection, misstates  
23 his testimony.  
24 MR. MOLONEY: Well, we have a  
25 record.

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1 GRIFFITH  
2 Q. Do you recall that testimony?  
3 MR. GENENDER: Objection, misstates  
4 his testimony.  
5 A. You have to repeat it again. I'm  
6 confused.  
7 Q. Do you recall testifying that the  
8 reason why you didn't think the \$10.04 was an  
9 appropriate valuation for the pharmacy script  
10 because it was the date as of the closing date  
11 of the APA transaction and not as of the  
12 petition date? Do you recall giving that  
13 testimony?  
14 MR. GENENDER: Objection, misstates  
15 the testimony.  
16 A. I think we have only looked at it as  
17 of the closing date.  
18 Q. Okay. There's a record. We will  
19 just leave it at that.  
20 Suppose ESL determined not to bid at  
21 all at this auction, what would be the value of  
22 our collateral as of petition date?  
23 MR. GENENDER: Objection, form.  
24 A. As of the petition date?  
25 Q. Yeah.

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1 GRIFFITH  
2 A. So going back and doing a  
3 hypothetical valuation of the collateral? It  
4 would be hard to say. I don't know.  
5 Q. Okay. And suppose the Uniform  
6 Commercial -- unsecured creditors committee  
7 prevailed and our bid was rejected, and it was  
8 sold to one of the liquidators for, let's say,  
9 28 cents on the dollar, would you say that was  
10 the value as of the petition date?  
11 MR. GENENDER: Objection, form.  
12 A. If that was the resulting bid that  
13 was accepted, I would agree with whatever that  
14 value is.  
15 Q. And suppose that ESL had allocated  
16 120 percent of the book value as part of its  
17 \$5.2 billion collateral, \$5.2 billion bid.  
18 Suppose it said, okay, of this bid, we are  
19 going to pay 120 percent of the value of the  
20 inventory, would that mean that's what the  
21 inventory was worth as of the petition date?  
22 MR. GENENDER: Objection, assumes  
23 facts not in evidence, lack of foundation.  
24 A. It's a hypothetical. As we've  
25 stated, the fair market value that we received,

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1 GRIFFITH  
2 ultimately, is how we think is the best way to  
3 look at similar collateral as of a separate  
4 date.  
5 Q. Doesn't whatever value that results  
6 from a competitive bid provide potential  
7 different value than the asset provided to the  
8 debtor in a going concern business at a  
9 different point in time?  
10 MR. GENENDER: Objection, form.  
11 A. Yeah, I'm not sure. You have to  
12 restate that question.  
13 Q. Doesn't whatever value that resulted  
14 from a competitive auction four months after  
15 the petition date provide a potentially  
16 different value than the assets were worth to  
17 the debtor in its going concern business as of  
18 the petition date?  
19 A. It's possible.  
20 Q. Okay. Now, I would like to show you  
21 Exhibit 16, which is the Schulte report.  
22 Before I do this, you're aware that  
23 the debtors' general business plan was to  
24 reorganize around a number of stores that were  
25 EBITDA positive at the store level; is that

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1 GRIFFITH  
2 correct?  
3 MR. GENENDER: Objection, form.  
4 A. I don't believe they were all EBITDA  
5 positive, but they were their best performers.  
6 Q. Wasn't the general business plan,  
7 from the start of the case, put together, I  
8 think in part with the help of Mr. Meghji, to  
9 basically identify stores that had a positive  
10 EBITDA as a potential footprint for a going  
11 concern sale? Is that a fair description of  
12 the plan going into the chapter 11 proceeding?  
13 MR. GENENDER: Objection to form.  
14 A. I don't believe so. I think the  
15 plan was to figure out the way to maximize  
16 value.  
17 Q. Okay. Was part of that plan to  
18 identify the stores that are positive EBITDA on  
19 a store level?  
20 MR. GENENDER: Objection, asked and  
21 answered.  
22 A. It was one portion of it, I'm sure,  
23 yes.  
24 Q. Were you involved in that analysis  
25 at all?

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1 GRIFFITH  
2 A. I was involved in that analysis.  
3 Q. Okay. In determining whether a  
4 store had a positive EBITDA, what -- how did  
5 you go about doing that?  
6 A. We would start with the four-wall  
7 data that we had available.  
8 Q. Can you explain to me what that  
9 means?  
10 A. It basically means the revenue  
11 generated by that store against its direct  
12 expenses within that store base.  
13 Q. And the revenue would be basically  
14 the gross profits from the sale of inventory?  
15 A. You said sales?  
16 Q. Yeah.  
17 A. Sales would be the revenue generated  
18 by the sale of inventory.  
19 Q. Yeah. I'm just saying you said  
20 revenues. I'm asking for the revenues.  
21 You're talking about basically the  
22 gross profits from the sale of inventory is the  
23 revenue, right?  
24 A. That would be the gross profit.  
25 Q. Well, you're deducting from the

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1 GRIFFITH  
2 revenue the direct expenses, right?  
3 MR. GENENDER: Objection, form, lack  
4 of foundation.  
5 A. In order to do what?  
6 Q. To figure out whether there's a  
7 positive EBITDA, right?  
8 A. It's part of the calculation, yes.  
9 Q. Okay, what is the full calculation?  
10 To figure out whether the store had a positive  
11 EBITDA, what are the elements that go into that  
12 equation?  
13 A. It's revenue less cost and expenses  
14 of the store.  
15 Q. So the revenue is going to be the  
16 gross revenue, right?  
17 A. Yes.  
18 Q. And that's going to be based on what  
19 you made by selling the inventory, right?  
20 A. Yes.  
21 Q. And the costs and expenses, what  
22 costs and expenses did, in fact, the company  
23 include when making this analysis that certain  
24 stores were positive EBITDA?  
25 A. Your typical store expenses,

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1 GRIFFITH  
2 payroll, rent, utilities, security. We'd have  
3 to look at the analysis, but those are some of  
4 the major categories.  
5 Q. Advertising, too?  
6 A. I believe so.  
7 MR. GENENDER: Objection to form.  
8 Q. Okay. And, now, Mr. Schulte --  
9 let's look at his report. He has, at  
10 page 10 -- at page 10 of his report, which is  
11 Exhibit 16 for identification, he lists three  
12 valuation methodologies, correct?  
13 A. I see that.  
14 Q. And the first one is based on the  
15 gross retail proceeds, right?  
16 A. That's what it says.  
17 Q. And the second is the net retail  
18 proceeds, correct?  
19 A. That's what it says.  
20 Q. And the third is book value; is that  
21 correct?  
22 A. That's what it says.  
23 Q. And the largest value, if you look  
24 at his analysis, which continues on page 12,  
25 you'll see the largest value is for the gross

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1 GRIFFITH  
2 retail value, the net retail value is the  
3 middle value, and the book value is the smaller  
4 value, right?  
5 A. That's what it shows.  
6 Q. And he's doing this only for the 400  
7 stores that were -- stores that were basically  
8 identified as the EBITDA positive stores,  
9 correct?  
10 MR. GENENDER: Objection to form.  
11 A. I don't -- I don't believe it was  
12 400 stores.  
13 Q. How many stores do you think were  
14 EBITDA positive?  
15 A. I believe it was more, but I don't  
16 know that number off the top of my head.  
17 Q. And then he has a different  
18 methodology for the -- he follows a slightly  
19 different methodology for stores that are going  
20 out of business sales.  
21 Do you see that?  
22 A. I do.  
23 Q. Okay. Now, a significant amount of  
24 inventory was, in fact, sold during the chapter  
25 11 case, right?

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1 GRIFFITH  
2 A. Which inventory?  
3 Q. Our collateral inventory.  
4 A. Okay.  
5 Q. Do you agree?  
6 A. Was inventory sold? Yes.  
7 Q. Okay. And the proceeds of that  
8 inventory was our collateral, right?  
9 MR. GENENDER: Objection, form.  
10 A. Again, I think we have a  
11 disagreement on the cash deposit accounts and  
12 how that actually works, but what is the  
13 question?  
14 Q. Are you disputing that the proceeds  
15 of the sale of our inventory was our  
16 collateral?  
17 MR. GENENDER: Objection, form, lack  
18 of foundation.  
19 A. The inventory collateral was your  
20 collateral, yes.  
21 Q. And what was sold, the proceeds were  
22 our collateral, right?  
23 A. Potentially, yes.  
24 Q. You understand that we had a grant  
25 of proceeds in our security document, correct?

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1 GRIFFITH  
2 MR. GENENDER: Objection, vague.  
3 A. I don't know the answer, no.  
4 Q. Okay. And do you know the magnitude  
5 of proceeds that were actually generated from  
6 sale of inventory during the chapter 11 case?  
7 A. No, I don't know off the top of my  
8 head.  
9 Q. Was it more than half a billion  
10 dollars?  
11 A. Yes.  
12 Q. And you don't account for the use of  
13 that money in your report, right?  
14 MR. GENENDER: Objection, form.  
15 A. In what respect?  
16 Q. I don't see it in either your  
17 initial declaration or in your second  
18 declaration, any discussion of those funds.  
19 MR. GENENDER: Objection, form,  
20 misstates the record.  
21 A. I don't know why I would be showing  
22 revenue.  
23 Q. Right. You don't even acknowledge  
24 that this money exists, right?  
25 MR. GENENDER: Objection,

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1 GRIFFITH  
2 MR. GENENDER: Objection,  
3 foundation. Objection, calls for  
4 speculation.  
5 A. I mean, I had to go through three  
6 reports. They kind of run together. I will  
7 have to go back and look.  
8 Q. Well, it says --  
9 MR. GENENDER: Are you going to let  
10 him look or are you going to ask a new  
11 question?  
12 MR. MOLONEY: He can look.  
13 A. (Document review.)  
14 It says he took retail inventory  
15 value, less cost to sell it, but that does not  
16 assume any corporate overhead.  
17 Q. Does the store EBITDA you referred  
18 to earlier include corporate overhead?  
19 A. I don't believe so.  
20 Q. Okay. Why wasn't that included in  
21 the EBITDA analysis that M-III put together for  
22 the company to identify whether or not stores  
23 were profitable?  
24 MR. GENENDER: Objection, asked and  
25 answered.

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1 GRIFFITH  
2 argumentative, misstates the record.  
3 A. We are showing collateral values,  
4 amounts outstanding under the facilities and  
5 the associated expenses that got us to the  
6 transaction.  
7 Q. When Schulte uses the net retail  
8 value, do you understand that he's using the  
9 same methodology that M-III was using for its  
10 EBITDA analysis at the store level?  
11 MR. GENENDER: Objection, form.  
12 A. I don't know that.  
13 Q. Well, do you have a reason to  
14 believe he did not use the same methodology?  
15 A. I don't have a reason to believe he  
16 used the same or did not use the same.  
17 Q. Did you study his report and find  
18 out what methodology he used?  
19 A. I did look at it when it was  
20 published, yes.  
21 Q. And how do you understand he came  
22 about the net retail proceeds --  
23 MR. GENENDER: Objection,  
24 foundation.  
25 Q. -- valuation?

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1 GRIFFITH  
2 A. Because that's not necessarily part  
3 of the store profitability. The exercise was  
4 done to determine how much cash a store network  
5 could throw off and how much overhead it could  
6 support to determine if you could make it a  
7 profitable enterprise.  
8 Q. Now, in paragraph 20 of your first  
9 declaration, which is Exhibit 4, you have a  
10 number of category of expenses.  
11 Do you see that?  
12 A. What page are we on?  
13 Q. Paragraph 20 of your first  
14 declaration, Exhibit 4, page 7.  
15 A. Yes.  
16 Q. Are you claiming that all of these  
17 expenses relate solely to store level costs?  
18 A. No.  
19 Q. Which one of these expenses don't  
20 relate to store level costs?  
21 A. There would be a mix between almost  
22 every category here between store and overhead.  
23 Q. Doesn't the EBITDA analysis, store  
24 level EBITDA analysis withdraw all of the --  
25 cover all the employee payroll compensation



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1 GRIFFITH  
2 expenses at a store level?  
3 A. At a store level, yes.  
4 Q. And it also covers the rent at a  
5 store level?  
6 A. Yes.  
7 Q. Does it cover any of the logistics  
8 and supply chain at the store level?  
9 A. I don't believe so.  
10 Q. Does it cover the utility and  
11 telephone expenses at a store level?  
12 A. I believe it does.  
13 Q. It covers advertising, correct?  
14 A. A portion of it.  
15 Q. It covers equipment expense,  
16 correct?  
17 A. I can't answer that one. No, I  
18 don't know.  
19 Q. It covers security services,  
20 correct?  
21 A. A portion of it, I'm sure.  
22 Q. So to the extent that the -- in  
23 EBITDA positive stores, there was over half a  
24 billion dollars generated in revenues, which  
25 were used to cover these expenses, did you

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1 GRIFFITH  
2 deduct that amount from the numbers that you  
3 have included in the chart in paragraph 20?  
4 MR. GENENDER: Objection, form.  
5 A. That's not the valuation or approach  
6 we had used.  
7 Q. So the answer to my question is no,  
8 you did not make any of those deductions?  
9 A. Only for the stores that were in GOB  
10 at the time.  
11 Q. You made the deductions for -- what  
12 do you mean by only for the stores in GOB?  
13 A. Stores that were in a wind-down  
14 mode. We had removed the expenses because the  
15 inventory would also be reserved against. So  
16 this was truly just the go-forward footprint,  
17 plus overhead.  
18 Q. What was the reason for why you  
19 included -- you removed the expenses for the  
20 wind-down stores?  
21 A. Because the inventory is reserved in  
22 the borrowing base and the expenses would be  
23 captured as part of the NOLV on the GOBs that  
24 were in process.  
25 Q. Right. I understand the expenses,

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1 GRIFFITH  
2 but the expenses are also captured in a net  
3 retail or EBITDA approach as well, aren't they?  
4 A. They may be. I don't -- we didn't  
5 take that approach. I'm not sure what the --  
6 Q. You explained to me --  
7 MR. GENENDER: Hang on. He's still  
8 answering. You keep cutting him off.  
9 MR. MOLONEY: I thought he finished.  
10 MR. GENENDER: You keep saying that.  
11 You keep cutting him off.  
12 Q. Do you have anything to add?  
13 MR. GENENDER: There's a big dash  
14 here. Do you see it?  
15 A. Yeah, I kind of forget where the  
16 train of thought was, but go ahead.  
17 Q. You explained to me that for the  
18 store level EBITDA analysis, you took revenues,  
19 you took gross revenues, right?  
20 A. Yes.  
21 Q. And you subtracted the cost and  
22 expenses just like Mr. Schulte did in his net  
23 retail analysis, correct?  
24 MR. GENENDER: Objection, form  
25 misstates testimony.

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1 GRIFFITH  
2 A. Yes.  
3 Q. And you said you subtracted payroll  
4 and rent and security and advertising.  
5 Do you recall giving that testimony?  
6 A. Yes.  
7 Q. Okay. So I'm asking those -- the  
8 gross revenues have already covered all of  
9 these expenses, and to the extent the gross  
10 revenues are our collateral, we've already paid  
11 for all these expenses, right, at a store  
12 level?  
13 MR. GENENDER: Objection, form,  
14 misstates the evidence.  
15 A. That's not how I read or the  
16 assumptions we have made around the 506(c)  
17 numbers we have incorporated here. We used a  
18 different approach.  
19 Q. I know you used a different  
20 approach, but I don't understand your approach.  
21 So explain to me what your approach is.  
22 MO MR. GENENDER: Object to the sidebar.  
23 Move to strike.  
24 A. My understanding is the 506(c) was  
25 all necessary, reasonable expenses that were

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1 GRIFFITH  
2 incurred to maximize the value. And that's  
3 what we have laid out here.  
4 Q. And do you feel it's fair for us to  
5 use our collateral twice for that purpose?  
6 MR. GENENDER: Objection, form,  
7 argumentative, assumes facts not in  
8 evidence.  
9 A. I'm just reading what the definition  
10 said, and that's what we have done here. It's  
11 all --  
12 Q. Do you --  
13 MR. GENENDER: He's still talking.  
14 MR. MOLONEY: Okay.  
15 MR. GENENDER: Let's take a break.  
16 I'm tired of you cutting him off. Let's  
17 take a break. Off the record.  
18 (Recess taken at 2:26 p.m. to  
19 2:37 p.m.)  
20 BY MR. MOLONEY:  
21 Q. Before they filed for chapter 11,  
22 Sears Holdings Corporation was a publicly  
23 traded company and filed SEC financials; is  
24 that correct?  
25 A. Yes.

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1 GRIFFITH  
2 Q. And in those consolidated  
3 financials, they represented the value of  
4 inventory as basically the lower of cost or  
5 market value -- or cost to market value; is  
6 that correct?  
7 MR. GENENDER: Objection, documents  
8 speak for themselves.  
9 A. I don't know for sure. I have not  
10 been through it.  
11 Q. Well, you criticize Mr. Schulte for  
12 using book value for his methodology for  
13 valuing the inventory and receivables, but  
14 isn't that the value that the company itself  
15 used in connection with its SEC financials that  
16 were audited by external outside auditors?  
17 MR. GENENDER: Objection, form,  
18 misstates the evidence.  
19 A. I don't know.  
20 Q. Assuming it was, why would it be  
21 inappropriate for Mr. Schulte to use that same  
22 methodology?  
23 MR. GENENDER: Objection to form,  
24 lack of foundation.  
25 A. Could you restate the question?

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1 GRIFFITH  
2 Q. Assuming that the methodology that  
3 Mr. Schulte chose, book value, is the same  
4 valuation the company used in its SEC financial  
5 statements that were audited by its external  
6 auditors, why would that be an inappropriate  
7 methodology?  
8 MR. GENENDER: Objection, form. You  
9 are completely misstating his supplemental  
10 declaration, paragraph 14, and it's  
11 blatant.  
12 MR. MOLONEY: Objection to form is  
13 enough. Thank you.  
14 MR. GENENDER: Your question is not  
15 founded on good faith. It's not a good  
16 faith question.  
17 MR. MOLONEY: That's enough.  
18 MR. GENENDER: I'm making my  
19 objection. It's not a good faith  
20 question.  
21 Q. Answer the question.  
22 A. They are used for different  
23 purposes.  
24 Q. Okay. And in what sense is it  
25 different?

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1 GRIFFITH  
2 MR. GENENDER: Objection, lack of  
3 foundation.  
4 A. One is being used for a 507(b)  
5 calculation, and one is for public company  
6 accounting. I don't know how I would draw a  
7 conclusion that they would be similar.  
8 Q. Why do you say the calculation for  
9 507(b) purposes are different than the ones  
10 done for public accounting?  
11 MR. GENENDER: Objection, calls for  
12 legal conclusion, lack of foundation,  
13 misstates his declaration.  
14 A. The company was in bankruptcy. It's  
15 not -- it's a different dynamic.  
16 Q. Okay. To the extent he used book  
17 value that was less than for the going concern  
18 stores, that was less than the value he showed  
19 as being net retail value; is that correct?  
20 MR. GENENDER: Objection, vague.  
21 Q. You can look at the report. It's  
22 not a memory test. Go ahead.  
23 MR. GENENDER: Where do you want him  
24 to look in the report?  
25 Q. You could look at page 12.

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1 GRIFFITH  
2 A. (Document review.)  
3 Yeah, I can't comment on his  
4 underlying assumptions, but these numbers here  
5 appear to show that.  
6 Q. Well, assuming he used, for his net  
7 retail value, the same EBITDA analysis for the  
8 425 profitable stores that were being used by  
9 the debtor, that's how he came up with his net  
10 retail value, by using book value, you're going  
11 to necessarily use a lower number, right?  
12 MR. GENENDER: Objection, misstates  
13 the evidence.  
14 A. I think that's incorrect. It's an  
15 incorrect way to look at it. The EBITDA  
16 analysis is not meant to represent net retail  
17 value.  
18 Q. Actually -- are you saying that  
19 EBITDA analysis doesn't show the net retail  
20 value?  
21 A. It shows store level EBITDA.  
22 Q. Right.  
23 A. Which does not have any allocations.  
24 Q. It has allocations to all the store  
25 level direct expenses, correct?

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1 GRIFFITH  
2 A. Again, it has no overhead  
3 allocations, so it's not the right number.  
4 MO MR. MOLONEY: I move to strike as  
5 not being responsive.  
6 Q. Can you answer my question?  
7 MR. GENENDER: There is no question.  
8 It's incomprehensible. Objection, form.  
9 MR. MOLONEY: The fact that you  
10 don't comprehend it, with all due respect,  
11 is irrelevant.  
12 If you could just say objection to  
13 form rather than coach the witness as  
14 you've decided to do since when you came  
15 back into the office, it would be  
16 appreciated.  
17 MR. GENENDER: I'm not in an office.  
18 I'm in a conference room. And I'm not  
19 coaching the witness. The questions are  
20 really, really hard to understand and hard  
21 to hear, actually.  
22 BY MR. MOLONEY:  
23 Q. Do you have a problem hearing my  
24 questions, Mr. Griffith?  
25 A. They are complicated to follow, yes.

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1 GRIFFITH  
2 A. It would not be allocations. It  
3 would be direct.  
4 Q. Okay. It covers all the direct  
5 store level expenses, right?  
6 A. The EBITDA analysis would.  
7 Q. Yes, it would, right?  
8 MR. GENENDER: Objection, asked and  
9 answered.  
10 Q. You have to say yes.  
11 A. I did. I said yes.  
12 MR. GENENDER: He did.  
13 MR. MOLONEY: I didn't hear it.  
14 Sorry.  
15 MR. GENENDER: It says so right on  
16 the screen.  
17 Q. And book value, by definition, is  
18 going to be less for EBITDA positive stores  
19 than the net retail value or value based on --  
20 by definition, for positive EBITDA stores, the  
21 book value of the inventory is going to be less  
22 than the valuation that includes the net margin  
23 that results in a positive EBITDA, right?  
24 MR. GENENDER: Objection, vague and  
25 ambiguous and confusing.

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1 GRIFFITH  
2 I don't see the EBITDA analysis as  
3 being something that would be relevant to this  
4 exercise.  
5 Q. Take a look at Exhibit 17 for  
6 identification, which is the Murray report.  
7 Mr. Griffith, this is a report you  
8 have reviewed; am I correct?  
9 A. Yes.  
10 Q. If you look at page 13, table 2?  
11 A. Okay.  
12 Q. You disagree with how Murray  
13 generally categorizes the L/Cs in this table?  
14 MR. GENENDER: Objection, vague,  
15 lack of foundation.  
16 A. I have to see the underlying data.  
17 I can't really comment on it.  
18 Q. Well, for purposes of your  
19 declaration, did you look at the underlying  
20 data of what type of L/Cs were involved?  
21 A. We looked at the L/C facilities,  
22 yes.  
23 Q. Did you look at what the specific  
24 standby L/Cs were that were being covered by  
25 the facilities?

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1 GRIFFITH  
2 A. Generally, we understand what they  
3 are, yes.  
4 Q. And you generally understand that  
5 the bulk of them are workers' compensation and  
6 surety bonds and utility, standby L/Cs?  
7 A. I don't think the utility is that  
8 large. I think it's mainly the workers' comp  
9 and auto liability.  
10 Q. And that's about 90 percent?  
11 A. I can't comment based on this, but  
12 that's what her table shows.  
13 Q. Do you have any reason to believe  
14 it's inaccurate?  
15 MR. GENENDER: Objection, lack of  
16 foundation.  
17 A. I don't have a basis to say it's  
18 accurate or not accurate.  
19 Q. In any event, all the L/Cs were  
20 standby L/Cs, right?  
21 MR. GENENDER: Objection, asked and  
22 answered.  
23 A. Yes, I believe so.  
24 Q. And they were essentially guarantees  
25 of financial -- performance of financial

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1 GRIFFITH  
2 obligations, correct?  
3 A. Yes.  
4 Q. And when they were put in place,  
5 they were not expected to be drawn, correct?  
6 MR. GENENDER: Objection, assumes  
7 facts not in evidence.  
8 A. Yeah. I can't say whether or not I  
9 think that they were meant to be drawn or not.  
10 They were put in place for a reason to handle  
11 the potential liabilities.  
12 Q. They would be put in place in the  
13 event that they failed to pay for the utilities  
14 or failed to pay their auto insurance or failed  
15 to pay their workers' compensation, right?  
16 A. Yes.  
17 Q. And in order -- a company in -- a  
18 company that's a going concern, in the ordinary  
19 course of business, will pay those bills,  
20 correct?  
21 MR. GENENDER: Objection, lack of  
22 foundation.  
23 A. Could you resay the question?  
24 Q. A company that's a going concern, in  
25 the ordinary course of its business, will pay

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1 GRIFFITH  
2 its worker compensation, auto insurance and  
3 utility bills, correct?  
4 A. Yes.  
5 Q. And under those circumstances, these  
6 L/Cs would not be drawn, correct?  
7 MR. GENENDER: Objection, calls for  
8 speculation.  
9 A. The liabilities would still exist.  
10 Q. Can you answer my question?  
11 MO MR. MOLONEY: Move to strike that  
12 answer.  
13 Q. Can you answer my question?  
14 MR. GENENDER: Asked and answered.  
15 A. Can you repeat the question?  
16 Q. I'm sorry?  
17 A. Could you repeat the question?  
18 MR. MOLONEY: Could you read it  
19 back?  
20 (Record read.)  
21 A. If they were meeting their  
22 obligations related to these liabilities, yes.  
23 Q. Okay. And, in fact, if you look at  
24 table 4 of the Murray report, which is on  
25 page 15, in the course of the chapter 11 case,

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1 GRIFFITH  
2 approximately \$9 million of L/Cs were, in fact,  
3 drawn; is that correct?  
4 A. That's what the table shows.  
5 Q. Do you have any reason to believe  
6 that's not the correct number?  
7 A. Again, I don't have a reason to  
8 believe or disbelieve.  
9 Q. Did you not investigate to see  
10 whether she's right?  
11 A. No, I was not looking into this  
12 table.  
13 Q. You didn't have your team look to  
14 see whether or not the source was correct?  
15 MR. GENENDER: Objection, asked and  
16 answered.  
17 A. It wasn't a material part of our  
18 argument, no.  
19 Q. Okay. Would you agree that if the  
20 L/Cs were separately collateralized, there  
21 would be no real risk that an issuing bank --  
22 separately cash collateralized, there would be  
23 no real risk that an issuing bank would make a  
24 draw against the inventory and receivables  
25 collateral in this case?

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1 GRIFFITH  
2 MR. GENENDER: Objection, calls for  
3 a legal conclusion.  
4 A. Can you restate the question as  
5 well?  
6 Q. If the L/Cs were collateralized in  
7 cash by someone other than the debtor, and  
8 there were no draws on the L/Cs, do you have  
9 any reason to believe that the L/C -- lender  
10 would take any action against the inventory and  
11 receivables?  
12 MR. GENENDER: Objection, lack of  
13 foundation, calls for speculation and  
14 assumes facts.  
15 A. A hypothetical third party putting  
16 up cash to collateralize Sears' L/Cs?  
17 Q. Yes. Assume that happened.  
18 MR. GENENDER: Objection, lack of  
19 foundation.  
20 A. It just didn't make sense to me.  
21 Q. It doesn't make sense to you?  
22 A. No.  
23 Q. Were you aware that \$271 million of  
24 the L/Cs are separately cash collateralized by  
25 my client and Sears?

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1 GRIFFITH  
2 A. But they have a first lien on the  
3 collateral.  
4 Q. The bank has cash collateral for  
5 \$271 million of the L/Cs that's not part of the  
6 first lien collateral, correct?  
7 A. Still an obligation of the company.  
8 MO MR. MOLONEY: Move to strike.  
9 Q. Can you answer the question?  
10 MR. GENENDER: Objection, asked and  
11 answered. He has.  
12 A. Could you restate the question?  
13 MR. MOLONEY: Could you read back  
14 the question?  
15 (Record read.)  
16 A. I'm not sure I follow the question.  
17 Q. Let me rephrase it.  
18 Citibank has \$271 million in cash  
19 it's holding as collateral for the L/Cs that it  
20 issued. That \$271 million of cash is not part  
21 of the first lien collateral, correct?  
22 MR. GENENDER: Objection, assumes  
23 facts.  
24 A. The cash is not.  
25 Q. Okay. So why would Citibank,

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1 GRIFFITH  
2 sitting there with \$271 million in cash for  
3 standby L/Cs, where there's been no draw, take  
4 any action against the shared collateral?  
5 A. I can't comment on what Citibank  
6 would do.  
7 Q. Do you think any lender in that  
8 circumstance would take such action?  
9 A. I can't comment on what I think a  
10 lender would do in terms of that.  
11 Q. Okay. Now, in fact, in paragraph 13  
12 of your affidavit, you say --  
13 MR. GENENDER: Which document?  
14 MR. MOLONEY: Supplemental  
15 affidavit, Exhibit 5, page 9.  
16 MR. GENENDER: Thank you.  
17 Q. Go to paragraph 13. You say in  
18 paragraph 13 of your supplemental report that,  
19 "In a liquidation scenario, L/Cs would be drawn  
20 or cash collateralized."  
21 MR. GENENDER: Supplemental  
22 declaration?  
23 MR. MOLONEY: Yes.  
24 Q. But you do not say the result is  
25 likely to occur in a going concern scenario,

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1 GRIFFITH  
2 correct?  
3 MR. GENENDER: Objection, the  
4 document speaks for itself.  
5 Q. Answer the question.  
6 A. Will they be fully drawn in a --  
7 Q. Let me rephrase the question.  
8 You say in paragraph 13 of your  
9 supplemental declaration, which is right in  
10 front of you, right?  
11 A. Yes.  
12 Q. That, "In a liquidation scenario,  
13 L/Cs would be drawn or cash collateralized,"  
14 correct?  
15 A. Yes.  
16 Q. Nowhere in that paragraph or  
17 elsewhere in either of your declarations do you  
18 give any opinion as to what would occur in a  
19 going concern scenario concerning the L/Cs; is  
20 that correct?  
21 A. It would be assumed as part of the  
22 sale. They were assumed, I should say.  
23 Q. Am I correct that, in neither  
24 declaration, you give any opinion as to what  
25 would occur in a going concern scenario

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1 GRIFFITH  
2 concerning the L/Cs?  
3 MR. GENENDER: Objection, asked and  
4 answered.  
5 A. I think we show them being assumed  
6 in our analysis.  
7 Q. Where is that?  
8 A. (Document review.)  
9 Exhibit A of the initial  
10 declaration.  
11 Q. Right.  
12 A. Exhibit 4, Exhibit A.  
13 Q. Page 4 and where?  
14 A. In the section where -- on the top,  
15 where it talks about the first lien debt, we  
16 show the standalone L/C facility of 271 and the  
17 letters of credit under the ABL of 118  
18 outstanding and assumed as of the effective  
19 date of the closing of the sale.  
20 Q. Okay. So if they are assumed,  
21 they're not drawn, correct?  
22 A. They remain an obligation, yes.  
23 Q. I couldn't follow exactly. What are  
24 you looking at exactly, so I make sure I look  
25 at the same page?

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1 GRIFFITH  
2 Q. And now the words "assume" don't  
3 appear on this page, right?  
4 A. The balances are shown in that  
5 column, so.  
6 Q. Those numbers show up, right, in the  
7 effective eight number?  
8 A. Yes.  
9 Q. The effective eight number, you're  
10 showing those balances?  
11 A. Yes.  
12 Q. But there's no text associated with  
13 those balances in your report, correct?  
14 A. We state that the L/Cs would -- let  
15 me find it. (Document review.)  
16 Q. We will just leave a blank here. If  
17 you find something, you can add it in when you  
18 review the transcript. So I will move on to  
19 another question.  
20 A. Okay.  
21 TO BE SUPPLIED  
22  
23 Q. Okay. And would you look at  
24 Exhibit 22 for identification, please? This is  
25 a first day declaration filed by Robert

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1 GRIFFITH  
2 A. Exhibit A, top left box that  
3 describes the --  
4 Q. Top left box?  
5 A. Top left, first lien debt.  
6 Q. Where does it say assumed?  
7 A. It remains outstanding as of the  
8 effective date of the close.  
9 Q. The words "assumed" are not there,  
10 right?  
11 A. The 118 is part of the 850 million  
12 DIP that's rolled over, which is the sum of the  
13 732 --  
14 Q. I'm just --  
15 MR. GENENDER: Hang on. He's still  
16 answering his question, Tom.  
17 MR. MOLONEY: Fine, fine.  
18 MR. GENENDER: Correct? Let him  
19 finish.  
20 Q. Go ahead.  
21 A. They are assumed. That's the whole  
22 purpose of showing them here as still  
23 outstanding.  
24 MO MR. MOLONEY: Move to strike that  
25 answer.

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1 GRIFFITH  
2 Riecker.  
3 Do you know who he is?  
4 MR. GENENDER: It's not a first day  
5 declaration. That's not true.  
6 MR. MOLONEY: I'm sorry. It's not a  
7 first day. It's a November 23, 2018,  
8 declaration by Mr. Robert A. Riecker,  
9 R-I-E-C-K-E-R.  
10 Q. Can you tell me who he is?  
11 A. Mr. Riecker is the CFO of Sears.  
12 Q. Did you review this document before  
13 it was filed with the court?  
14 A. I don't believe I did.  
15 Q. Do you know whether any member of  
16 the M-III team would have reviewed the  
17 document?  
18 A. Somebody most likely did.  
19 Q. And looking at paragraph 8, the  
20 third sentence down, it says, "Around the  
21 commencement date, the pre-petition ABL  
22 facility collateral was valued at approximately  
23 \$2.8 billion."  
24 Do you see that?  
25 A. Yes.



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1 GRIFFITH  
2 Q. That's book value, right?  
3 MR. GENENDER: Objection, form.  
4 A. I don't know from looking at this.  
5 Q. And then it says, "of which the net  
6 orderly liquidation value," and it says NOLV in  
7 parens, in quotations, "of the debtors'  
8 inventory was valued at about \$2.74 billion."  
9 That was -- those numbers would have  
10 been reviewed by M-III before they were put  
11 into this declaration by the CFO, correct?  
12 MR. GENENDER: Objection, calls for  
13 speculation, lack of foundation.  
14 A. That, I can't say. I don't know  
15 that.  
16 Q. You believe they were, though,  
17 right?  
18 MR. GENENDER: Objection, asked and  
19 answered.  
20 A. I mean, I just don't know.  
21 Q. And then you see, "With  
22 approximately 1.53 billion borrowed against it  
23 under the pre-petition ABL facility."  
24 Do you see that?  
25 A. Uh-huh. Yes.

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1 GRIFFITH  
2 A. Yes.  
3 Q. So does that -- looking at that,  
4 does that -- does that confirm that, in fact,  
5 when Mr. Riecker was putting a declaration in  
6 support of the cash collateral and DIP order in  
7 this case, he did not include the unfunded L/Cs  
8 in the amount he viewed as being outstanding?  
9 MR. GENENDER: Objection, lack of  
10 foundation.  
11 A. I can't comment on what he did or  
12 his motivation in his declaration.  
13 Q. We know what he did, right? You're  
14 looking at the number. You know what he did,  
15 right?  
16 MR. GENENDER: Objection, lack of  
17 foundation.  
18 Q. You can answer.  
19 A. I see the number here, yes.  
20 Q. The number is, he did not include  
21 those values in his declaration?  
22 MR. GENENDER: Objection, asked and  
23 answered.  
24 A. It's for different purposes. I  
25 don't know.

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1 GRIFFITH  
2 Q. That does not -- that \$1.53 billion  
3 number does not include any of the unfunded  
4 L/Cs, either the Citibank facility or the ABL  
5 facility, correct?  
6 MR. GENENDER: Objection, lack of  
7 foundation.  
8 A. That, I don't know. I can't tell  
9 from looking at this.  
10 Q. You can't tell from the math that  
11 the \$1.53 million does not include the unfunded  
12 L/Cs?  
13 MR. GENENDER: Objection, lack of  
14 foundation.  
15 A. What math?  
16 Q. The math of adding on to the  
17 \$1.53 billion number the amount of the two L/C  
18 numbers.  
19 A. Yeah, I'm not sure what you're  
20 comparing against.  
21 Q. Why don't you look at your Exhibit A  
22 of Exhibit 4?  
23 A. (Document review.) Okay.  
24 Q. If you subtract 271 and 124 from  
25 1927, don't you get 1.53?

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1 GRIFFITH  
2 Q. What purpose was he doing it? He  
3 was telling the court how much debt there was  
4 outstanding for purposes of getting approval of  
5 additional debt, right?  
6 MR. GENENDER: Objection, lack of  
7 foundation and calls for speculation.  
8 A. I was not involved in that  
9 declaration. I don't know what the purpose  
10 was. Ours was for the 507(b) analysis.  
11 Q. You weren't involved at all in  
12 connection with the adequate protection order  
13 that basically started this whole dispute?  
14 MR. GENENDER: Objection, form,  
15 misstates the record.  
16 A. I was not. It was not part of my  
17 responsibilities.  
18 Q. So does that mean that you didn't  
19 look at -- who was the person who would have  
20 been involved helping analyze the proposed DIP  
21 financings and proposed use of cash collateral  
22 and proposed adequate protection within M-III?  
23 A. I don't know, sitting here, who was  
24 responsible for that part of it.  
25 Q. You would expect the CRO to be

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1 GRIFFITH  
2 looking at that, right?  
3 A. I don't know. I'd be speculating.  
4 Q. You think it's speculation that  
5 Mr. Meghji would not be looking at that issue  
6 at the beginning of the case as to whether or  
7 not you're going to have DIP financing?  
8 MR. GENENDER: Objection to form.  
9 A. I can't answer that. I don't know  
10 who looked at this.  
11 Q. Would you take a look at Exhibit 18  
12 in your pile?  
13 MR. GENENDER: 18?  
14 MR. MOLONEY: Yes, please.  
15 MR. GENENDER: You bet. Thank you.  
16 Q. This is a declaration of Mohsin J.  
17 Meghji, dated October 15, 2018, okay?  
18 MR. GENENDER: That is the first day  
19 of the case. We agree on that.  
20 MR. MOLONEY: That's good.  
21 Q. Is this a document you would have  
22 looked at before it was filed by Mr. Meghji?  
23 A. I don't recall specifically looking  
24 at this, no.  
25 Q. Looking at paragraph 10, Mr. Meghji

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1 GRIFFITH  
2 says, "The debtors decided to seek chapter 11  
3 protection to take advantage of the relief  
4 afforded by the automatic stay and obtain  
5 debtor-in-possession financing as to seek to  
6 execute their restructuring objectives, namely,  
7 one, execute GOB sales and non-core asset  
8 sales; two, evaluate the bubble stores; and,  
9 three, try to secure a going concern sale or a  
10 reorganization involving a core group of  
11 stores."  
12 Do you agree that those were the  
13 debtors' objectives going into the chapter 11  
14 case?  
15 MR. GENENDER: Objection, form.  
16 A. Those were strategies to achieve the  
17 goal, which would be to maximize value.  
18 Q. But you disagree with Mr. Meghji's  
19 choice of words to call these restructuring  
20 objectives?  
21 MR. GENENDER: objection, misstates  
22 the testimony.  
23 A. They're paths to achieving the  
24 objective of maximizing value.  
25 Q. Did these remain the paths that the

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1 GRIFFITH  
2 debtor continued to follow throughout the case?  
3 A. Could you restate that question?  
4 MR. MOLONEY: Could you read it  
5 back?  
6 (Record read.)  
7 A. Yes.  
8 Q. And weren't all the expenditures in  
9 this case directed to achieving these three  
10 objectives except for those used -- the money  
11 used to spend -- spend to investigate potential  
12 claims against my client, ESL?  
13 MR. GENENDER: Objection, form.  
14 A. Again, the goal was to maximize  
15 value, and these were ways to achieve it. I  
16 don't know what else you want to say on that --  
17 want me to say on that.  
18 Q. So all the money that was spent in  
19 this case was for that goal of maximizing  
20 value, right?  
21 MR. GENENDER: Objection, lack of  
22 foundation and misstates the testimony.  
23 A. Yes. Our job was to maximize the  
24 value of the estate.  
25 Q. And neither ESL nor any of the

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1 GRIFFITH  
2 second lien creditors had the ability to cause  
3 the debtors to make any of the expenditures  
4 incurred in this case, correct?  
5 MR. GENENDER: Objection, form.  
6 A. I don't understand the question.  
7 Q. Did people who were governing the  
8 debtor, the governance body of the debtor did  
9 not include ESL or any of the other second lien  
10 creditors who are sitting here in this  
11 deposition, correct?  
12 MR. GENENDER: Objection, misstates  
13 the record.  
14 A. There was a restructuring committee  
15 and management team in place, yes.  
16 Q. And that did not include ESL or any  
17 representative of ESL, that did not include any  
18 representative of the other second lien  
19 creditors who are sitting here today, correct?  
20 MR. GENENDER: Objection, form,  
21 misstates the record.  
22 A. I believe Mr. Lambert is still  
23 associated with the board, but not part of the  
24 restructuring committee.  
25 Q. Okay. And the decision whether to

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1 GRIFFITH  
2 liquidate the entire enterprise was one that  
3 was an issue from day one in this case,  
4 correct? [REDACTED]  
5 A. I'm sorry. Can you say that again?  
6 Q. The decision whether or not to do an  
7 orderly liquidation of the entire enterprise  
8 was an issue from day one in this case,  
9 correct? [REDACTED]  
10 A. It was an option.  
11 Q. Wasn't that something the unsecured  
12 creditors committee advocated almost from the  
13 outset of these cases?  
14 A. I don't recall how their position  
15 changed over time, but I -- I don't know. I'm  
16 not part of that committee.  
17 Q. Are you aware that they publicly  
18 advocated that position from almost the outset  
19 of this case up until and including through the  
20 sale hearing, correct?  
21 A. At points in time, I believe they  
22 did, yes. I can't say what points.  
23 Q. To the extent the debtor chose not  
24 to liquidate, you're not telling us they did it  
25 out of loyalty to ESL, are you?

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1 GRIFFITH  
2 A. I was not involved in the  
3 decision-making process at that level, so I  
4 don't know.  
5 Q. And, in fact, ESL was never chosen  
6 as a stalking horse bidder or given any of the  
7 benefits when a company being given that  
8 status, correct?  
9 MR. GENENDER: Objection, form,  
10 compound.  
11 A. Again, I wasn't involved in that  
12 part of the process.  
13 Q. From day one, if the debtors wanted  
14 to preserve the option of selling the business  
15 with 425 profitable stores at its core, they  
16 had no choice but to operate those stores that  
17 they wanted to sell in the ordinary course,  
18 correct?  
19 MR. GENENDER: Objection, misstates  
20 the record.  
21 A. If you want to sell the stores, you  
22 have to operate the stores, yes.  
23 Q. Right. And so that was a decision  
24 point every day in the case until the final  
25 sale to ESL, right, as to whether or not to

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1 GRIFFITH  
2 operate the stores or liquidate the stores,  
3 right? [REDACTED]  
4 A. I wouldn't say it was an everyday  
5 decision, no.  
6 Q. At any day, they could have decided  
7 to do one or the other, right?  
8 MR. GENENDER: Objection, form.  
9 A. I mean, at certain points, you could  
10 pivot your strategic direction, yes, but --  
11 Q. And that decision could have been  
12 made at any day from the day of October 15  
13 right through the day they sold the stores to  
14 ESL, right?  
15 A. I don't know the answer to that. I  
16 wasn't involved at that level in terms of  
17 strategic decision making.  
18 Q. So what changed on December 28 from  
19 October 15 or November 1 or November 30? Why  
20 is December 28 of any more relevance?  
21 MR. GENENDER: Objection, vague.  
22 A. I don't know.  
23 Q. Okay.  
24 A. I wasn't involved.  
25 Q. And what changed on January 17, if

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1 GRIFFITH  
2 anything?  
3 MR. GENENDER: Objection, vague.  
4 A. Again, I don't know the answer to  
5 that.  
6 Q. I want to show you Exhibit 21. You  
7 mentioned a restructuring committee.  
8 Is Mr. Carr involved with the  
9 restructuring committee?  
10 A. Yes.  
11 Q. Have you seen this declaration  
12 before?  
13 A. It's possible. I don't -- can't say  
14 I remember.  
15 Q. What was Mr. Carr's position in  
16 connection with the restructuring committee?  
17 A. He was a member of the restructuring  
18 committee.  
19 Q. And it had two members; is that  
20 right?  
21 A. It was a subcommittee.  
22 MR. GENENDER: Misstates the record.  
23 Q. I'm just asking. I don't know what  
24 the answer is.  
25 So how many members? Do you know

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1 GRIFFITH  
2 how many members there were?  
3 A. There were at least four.  
4 Q. Okay. And they had their own  
5 counsel, Paul Weiss?  
6 A. The restructuring committee did not  
7 have their own counsel.  
8 Q. If you look at paragraph 5 --  
9 page 5, rather, paragraph 10.  
10 A. Okay.  
11 Q. Do you see where it says, "The  
12 subcommittee has engaged experienced legal and  
13 financial advisors to assist in its  
14 investigation, Paul, Weiss, Rifkind, Wharton &  
15 Garrison LLP and conflicts counsel, Young  
16 Conaway Stargatt & Taylor"?  
17 MR. GENENDER: Subcommittee is  
18 different than the restructuring  
19 committee.  
20 MR. MOLONEY: Okay.  
21 Q. What's the difference between a  
22 subcommittee and a restructuring committee,  
23 then?  
24 A. I was not involved with the  
25 restructuring subcommittee at any real level.

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1 GRIFFITH  
2 So I couldn't tell you exactly what the  
3 difference was.  
4 Q. It says -- in paragraph 7, he refers  
5 to restructuring subcommittee as the  
6 subcommittee.  
7 Do you know if there's any  
8 difference between a restructuring committee  
9 and the so-called subcommittee as suggested by  
10 your counsel?  
11 A. Yes, there is a difference.  
12 Q. What is the difference?  
13 A. A subcommittee is made up of a  
14 smaller group of the committee.  
15 Q. Smaller group of the restructuring  
16 committee?  
17 A. Yes.  
18 Q. Okay. And the subcommittee had its  
19 own -- the subcommittee is the restructuring  
20 subcommittee, right?  
21 A. I believe it's defined as the  
22 subcommittee.  
23 Q. Paragraph 7 says, "Restructuring  
24 subcommittee is defined as the subcommittee,"  
25 right?

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1 GRIFFITH  
2 A. Okay.  
3 Q. They had their own counsel, right?  
4 A. That's my understanding, yes.  
5 Q. Two sets of counsel, actually?  
6 A. That's what it says.  
7 Q. And it looks like three sets of  
8 financial advisors?  
9 A. That's what it says.  
10 Q. And their focus was to investigate  
11 my client, right?  
12 MR. GENENDER: Objection, form, lack  
13 of foundation.  
14 A. I don't know what their specific  
15 task was for.  
16 Q. Do you see, in paragraph 14, they  
17 are referring to our investigation?  
18 MR. GENENDER: Objection, lack of  
19 foundation.  
20 Q. Well, this is part of the expenses  
21 of this subcommittee and these three sets of  
22 advisors that you're trying to surcharge my  
23 client for, right?  
24 MR. GENENDER: Objection, misstates  
25 the record.

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1 GRIFFITH  
2 Q. Is that not correct?  
3 A. I do not believe that is correct.  
4 Q. They aren't included within the  
5 professional expenses that you list at  
6 \$51 million?  
7 A. I do not believe so.  
8 Q. So you have excluded them?  
9 A. Yes.  
10 Q. What else did you exclude?  
11 A. There were a significant number of  
12 professional fees that were excluded.  
13 Q. Which ones?  
14 A. The professional fees that we have  
15 in here were developed by reviewing each  
16 professional firm and looking at the billing  
17 tasks to come up with a subset of total  
18 professional fees that related strictly to the  
19 M&A and sale transactions associated with  
20 selling the stores.  
21 Q. So you're saying that the  
22 \$51 million solely was the M&A team?  
23 MR. GENENDER: Objection, misstates  
24 the testimony.  
25 A. It was related by firm to task codes

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1 GRIFFITH  
2 that made sense as part of the transaction to  
3 sell the store base.  
4 Q. Okay. Now, looking at paragraph  
5 29 -- 30, rather.  
6 MR. GENENDER: Of?  
7 MR. MOLONEY: 31 of the same  
8 document.  
9 Q. He lists some of the people who  
10 benefited from the going concern bid, right?  
11 And under A, he lists the non-ESL  
12 third-party secured creditors will receive an  
13 additional \$152 million, right?  
14 MR. GENENDER: Objection, misstates  
15 the document.  
16 MR. MOLONEY: I don't believe I  
17 misstated.  
18 Q. But go ahead. You may answer.  
19 MR. GENENDER: It's not what it  
20 says.  
21 A. Could you say it again?  
22 Q. Under point A, he says, "Non-ESL  
23 third-party secured creditors will receive an  
24 additional \$152 million," correct?  
25 A. That's part of the sentence, yes.

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1 GRIFFITH  
2 Q. Okay. The rest of it just indicates  
3 how the money is being divided up between the  
4 two -- between Cyrus and other third-party  
5 creditors, right?  
6 A. That's what it appears to show.  
7 Q. Right. And then below that, it  
8 shows all of the other claims that are being  
9 satisfied in full by the ESL bid, right? The  
10 senior DIP satisfied in full, the junior DIP  
11 satisfied in full, the final DIP was satisfied  
12 in full, and the Citi L/C facility is satisfied  
13 in full, right?  
14 A. Under which scenario?  
15 Q. Under recovery.  
16 A. But under which scenario? You're  
17 saying under --  
18 Q. ESL bid.  
19 A. Yes, then I agree.  
20 Q. Then, in addition, the Dove loans  
21 are getting paid 65 percent?  
22 A. That's what it says.  
23 Q. And the GL/IP loans are being paid a  
24 hundred percent, right?  
25 A. That's what it says.

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1 GRIFFITH  
2 Q. And then turning the page, it says,  
3 "In addition, unsecured creditors will receive  
4 an additional \$534 million," right?  
5 MR. GENENDER: Objection. It  
6 misstates the document.  
7 MR. MOLONEY: Noted.  
8 Q. You may answer.  
9 A. Could you restate it?  
10 Q. B, it says, "Pre-petition unsecured  
11 creditors will receive an additional  
12 \$534 million," correct?  
13 A. That's what it says.  
14 Q. And it says, "This excludes  
15 additional recoveries on account of cure  
16 claims," right?  
17 A. That's what it says.  
18 Q. And it says, "ESL will pay for  
19 material administrative claims of the debtors'  
20 estates," under C, "and the debtors will occur  
21 materially less administrative claims under the  
22 ESL sale versus liquidation (an aggregate  
23 \$621 million benefit to debtors' estates) as  
24 illustrated in the chart below," correct?  
25 A. That's what it says.

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1 GRIFFITH  
2 Q. And then it says, "As result of the  
3 terms of the limited release, nearly all  
4 proceeds of the debtors' preserved litigation  
5 claims will inure to the benefit of non-insider  
6 creditors," right?  
7 A. That's what it says.  
8 Q. And E says the debtors will receive  
9 an additional 35 million.  
10 MR. GENENDER: Objection, form,  
11 misstates the document.  
12 Q. Right? In exchange for limited  
13 release, right?  
14 A. That's what it says.  
15 Q. And "NewCo will extend offers of  
16 employment to at least 45,000 of debtors'  
17 employees," right?  
18 A. That's what it says.  
19 Q. Now, so the benefits of this  
20 transaction went far beyond the benefits to the  
21 second lienholders, right?  
22 A. According to this, there were other  
23 parties that had benefit.  
24 Q. Now, you're not saying that the  
25 \$5.2 billion transaction was done primarily to

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1 GRIFFITH  
2 provide \$433 million of benefit to the second  
3 lien collateral, right?  
4 A. I think it was one of the major  
5 considerations.  
6 Q. Okay. And you're not really  
7 claiming the debtor spent \$1.4 billion to  
8 preserve \$433 million of second lien  
9 collateral, are you?  
10 MR. GENENDER: Objection, form,  
11 misstates the evidence.  
12 A. Those were the costs associated that  
13 were required to get this to an ultimate sale.  
14 Q. Right. But you would never, as an  
15 economic matter, right, you're a  
16 businessperson, you would never spend  
17 \$1.4 billion to get \$433 million of value,  
18 right?  
19 MR. GENENDER: Objection, misstates  
20 the evidence.  
21 A. My alternative was getting zero and  
22 I could net 433, I would.  
23 Q. You would spend \$1.4 billion to get  
24 to 433?  
25 A. In an immediate liquidation, it

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1 GRIFFITH  
2 would have been a zero recovery or close to a  
3 zero recovery. So for the debtors to expend  
4 the money and run the operations and have it  
5 result in a material recovery to the 2Ls, I  
6 don't see how that's not economic.  
7 Q. Are you claiming that this was  
8 really done for the benefit of the 2Ls?  
9 A. It was certainly part of the reason.  
10 MR. MOLONEY: Okay. No more  
11 questions. Pass the witness.  
12 MR. LIUBICIC: Why don't we take  
13 five minutes and I can streamline some of  
14 my outline based on Mr. Moloney's  
15 questioning.  
16 (Recess taken at 5:25 p.m. to  
17 5:39 p.m.)  
18 MR. GENENDER: I think Mr. Griffith  
19 has to clarify one answer he gave in the  
20 prior testimony, if he can do that before  
21 you start, Bob.  
22 THE WITNESS: The one clarification  
23 from the last set of questions, I stated  
24 that Paul Weiss and the other subcommittee  
25 professionals would have been excluded

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1 GRIFFITH  
2 from that 51 million we have included.  
3 The clarification would be any time  
4 they had spent related to the sale process  
5 in their billing descriptions would  
6 potentially be included in the 51, but not  
7 the entire amount of Paul Weiss bills,  
8 just the portion of them and their  
9 advisors that would be related to the  
10 sale.  
11 MR. MOLONEY: Fine. Thank you for  
12 the clarification.  
13 MR. GENENDER: You bet. Thank you.  
14 EXAMINATION BY  
15 MR. LIUBICIC:  
16 Q. Mr. Griffith, I'm Rob Liubicic. We  
17 met before. I represent Cyrus Capital in this  
18 case.  
19 A. Yes.  
20 Q. Why don't we first have a look at  
21 your original declaration. And for the record  
22 that's Exhibit --  
23 MR. GENENDER: 4.  
24 Q. -- 4.  
25 A. Okay.

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1 GRIFFITH  
2 Q. So let's look at paragraph 8,  
3 please. Are you there?  
4 A. I am.  
5 Q. Okay. Do you see the last sentence  
6 starts out, "Based on M-III's prior liquidation  
7 analyses, had the debtors liquidated as of the  
8 petition date, the second lienholders would  
9 have received a few cents on the dollar," and  
10 it goes on from there?  
11 A. Yes.  
12 Q. What are the prior liquidation  
13 analyses you are referring to there?  
14 A. There were certain liquidation  
15 analyses that were done during the case that we  
16 had used.  
17 Q. Okay. How many?  
18 A. We had done several, I think, over  
19 the course of the case.  
20 Q. And "we" meaning M-III or someone  
21 else?  
22 A. M-III and the professionals from the  
23 debtors.  
24 Q. Okay. Did you work on those  
25 analyses?



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1 GRIFFITH  
2 A. I did not.  
3 Q. Okay. Do you know if those analyses  
4 have been produced in this case?  
5 A. I can't say for certain. I don't  
6 know.  
7 Q. All right. Now, let's look at  
8 paragraph 13, which is on the next page.  
9 A. Okay.  
10 Q. And do you see you said, in  
11 paragraph 13, "Taking many of Cyrus'  
12 assumptions as true," and it goes on from  
13 there?  
14 A. Yes.  
15 Q. I believe you testified earlier  
16 today that, and I wrote it down, "We were using  
17 Cyrus values from the initial Cyrus offer."  
18 Do you recall giving that testimony?  
19 A. I do.  
20 Q. What offer is that that you're  
21 referring to?  
22 A. There were discussions that were  
23 begun, I forget if it was back in maybe March,  
24 April time frame, to discuss potential 507(b)  
25 claims and settlement discussions.

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1 GRIFFITH  
2 Q. It was a settlement discussion,  
3 right?  
4 A. Yes, I believe so.  
5 Q. Were you present for that settlement  
6 discussion?  
7 A. I was present for one meeting.  
8 Q. Okay. What was your purpose in  
9 using Cyrus values from the initial Cyrus offer  
10 in your original declaration?  
11 A. Just to show it as a  
12 apples-to-apples comparison.  
13 Q. Just to show what as an  
14 apples-to-apples comparison?  
15 A. The things we list here in terms of  
16 the total amount of first lien, the total  
17 second lien debt and total gross collateral.  
18 Q. So you used Cyrus values from the  
19 initial Cyrus offer to come up with an alleged  
20 amount of diminution value of 2L collateral,  
21 correct?  
22 A. That was the -- yes, that was what  
23 we did.  
24 Q. And you see you said that the  
25 assumptions you take as true include total

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1 GRIFFITH  
2 first lien debt, second lien debt and total  
3 gross collateral?  
4 A. Yes, that's what I just said.  
5 Q. Okay. What Cyrus assumptions did  
6 you not take as true?  
7 A. We used the fair market value of  
8 85 percent as we calculate.  
9 Q. And then could we look at Exhibit A  
10 to your original declaration, please?  
11 So you would agree with me that, for  
12 purposes of your Exhibit A, you did not take  
13 all of Cyrus' assumptions as true, correct?  
14 A. Not all of them, no.  
15 Q. Did you take as true Cyrus'  
16 assumption of whether the L/Cs should be  
17 treated as funded debt?  
18 A. I don't recall what their assumption  
19 was.  
20 Q. Where do you recall those  
21 assumptions being laid out? Is it a document?  
22 A. It was discussions and a document, I  
23 believe.  
24 Q. Do you remember what that document  
25 looked like?

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1 GRIFFITH  
2 A. Yes.  
3 Q. Do you remember that document  
4 referencing settlement?  
5 A. It may have.  
6 Q. You reviewed the Murray report prior  
7 to submitting your supplemental declaration,  
8 correct?  
9 A. Yes.  
10 Q. And you respond to it in your  
11 supplemental declaration?  
12 A. I do.  
13 MR. GENENDER: Object to form.  
14 Q. Is your supplemental declaration a  
15 complete statement of your criticisms of  
16 Ms. Murray's report?  
17 A. I's hard to say. I don't know. I  
18 think we touched on the most important ones.  
19 Q. As you sit here today, do you have  
20 any criticisms of Ms. Murray's report that you  
21 believe are not contained in your supplemental  
22 declaration?  
23 MR. GENENDER: Objection, form.  
24 A. I believe the material problems we  
25 had with it, we have identified.

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1 GRIFFITH  
2 Q. Do you presently intend to testify  
3 about any aspect of Ms. Murray's analysis other  
4 than what's in your supplemental declaration?  
5 MR. GENENDER: Objection, form.  
6 A. Not that I'm aware of.  
7 Q. Now, let's look at your supplemental  
8 declaration, please. And for the record that  
9 is exhibit --  
10 MR. FOX: It's 5.  
11 MR. LIUBICIC: Thank you.  
12 Q. Let's turn to paragraph 6,  
13 Mr. Griffith.  
14 And do you see, down near the bottom  
15 of that paragraph on page 4, you have, in  
16 bolded type, first, second and third?  
17 A. Yes.  
18 Q. Okay. So looking at first, you  
19 said, "Each of the reports rely on incorrect or  
20 misapplied data taken from other sources."  
21 Do you see that?  
22 A. I do.  
23 Q. What incorrect or misapplied data do  
24 you believe Ms. Murray relied on?  
25 A. I have to go to the report to

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1 GRIFFITH  
2 value appears to be at the gross book value,  
3 which I wouldn't think would be the correct  
4 starting point.  
5 Q. By the high case, do you mean  
6 Ms. Murray's analysis based on the numbers in  
7 Mr. Riecker's declaration?  
8 A. That might be right, yes.  
9 Q. Anything else?  
10 A. I think those were the major points,  
11 as I'm sitting here, that I can recall.  
12 Q. Okay. Going back to paragraph 6 of  
13 your supplemental declaration, you say,  
14 "Second, each uses a different and incorrect  
15 methodology to calculate the value of the  
16 debtors' inventory."  
17 Do you believe Ms. Murray used an  
18 incorrect methodology to calculate the value of  
19 inventory?  
20 A. As I just mentioned, I do. I  
21 believe that two billion seven forty of  
22 inventory is a gross book value.  
23 Q. Okay. And what about in  
24 Ms. Murray's minimum case, do you believe she  
25 used an incorrect methodology?

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1 GRIFFITH  
2 refresh my memory.  
3 Q. That's the Murray report?  
4 A. Yes.  
5 Q. I believe that's Exhibit 17.  
6 A. (Document review.)  
7 I think the first was similar to  
8 what we previously discussed, the collateral of  
9 the 2L debt.  
10 Q. And are you referring to your  
11 position that Ms. Murray includes items that  
12 she believes are 2L collateral that you believe  
13 are not?  
14 A. That's correct.  
15 Q. What else?  
16 A. (Document review.)  
17 I think, as we mentioned as well,  
18 the treatment of the L/Cs.  
19 Q. And are you referring to the fact  
20 that Ms. Murray did not include the L/Cs as  
21 funded debt?  
22 A. Yes.  
23 Q. Okay. What else?  
24 A. (Document review.)  
25 In the high case scenario, inventory

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1 GRIFFITH  
2 A. I don't believe so.  
3 Q. I would like to get on the same page  
4 with you on some terminology.  
5 First off, what's your understanding  
6 of what an NOLV is?  
7 A. It's a net orderly liquidation  
8 value.  
9 Q. What does that mean to you?  
10 A. It's an estimation of what you would  
11 expect to recover on inventory in a liquidation  
12 after accounting for certain expenses.  
13 Q. In an orderly liquidation, correct?  
14 A. I think you can apply it to any type  
15 of liquidation. It would depend on the  
16 severity of the discount to depart or a hundred  
17 percent.  
18 Q. How would you define an orderly  
19 liquidation?  
20 A. I would say it's not a full-blown  
21 fire sale, where you're shutting every store.  
22 You have proper planning, likely up to four  
23 weeks prior to starting a liquidation sale at a  
24 store to properly inventory it, then have the  
25 proper amount of time to sell the inventory in

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1 GRIFFITH

2 the stores, and then the ultimate winding down

3 of the location and transferring whatever

4 remaining inventory was there.

5 Q. And can you point me to any

6 authority supporting that definition?

7 A. You asked me to provide an

8 understanding of it. I don't think I can point

9 you to an authority.

10 Q. Okay. Let's look at paragraph 8 of

11 your supplemental declaration, please.

12 So, again, I'm just focused on

13 terminology at this point. In the first

14 sentence of paragraph 8, you talk about -- you

15 use the phrase "either a wind-down or a

16 liquidation scenario."

17 Do you see that?

18 A. Yes.

19 Q. What do you mean by a wind-down?

20 A. Shutting down the operations of the

21 estate or the stores.

22 Q. And what do you mean by a

23 liquidation scenario?

24 A. I mean, I would say they're similar.

25 Q. Are they the same?

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1 GRIFFITH

2 A. Shutting all the stores at the same

3 time and pushing all the inventory into those

4 locations.

5 Q. And then do you see in the next

6 sentence you reference the margins in a fire

7 sale?

8 A. Yes.

9 Q. What do you mean by a fire sale?

10 A. The full retail liquidation where

11 you're doing everything at once in a very fast

12 manner.

13 Q. So a full retail liquidation and a

14 fire sale are interchangeable for purposes of

15 your supplemental declaration?

16 A. They would approximate each other,

17 yes.

18 Q. Is a fire sale not orderly, in your

19 mind?

20 Actually, let me rephrase it.

21 Is a fire sale something other than

22 an orderly liquidation, in your mind?

23 A. I think the pace is faster, but

24 along the same lines in terms of what would

25 need to be accomplished.

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1 GRIFFITH

2 A. They would be pretty close.

3 Q. Okay. You wrote this, right?

4 A. I did.

5 Q. So I'm just trying to understand

6 what you mean, because you use -- you use --

7 you appear to use a number of different terms

8 in your declaration. So I want to understand.

9 What's the difference, if there is

10 one, between wind-down and liquidation

11 scenario?

12 A. I'd say they're pretty similar.

13 Q. As you sit here right now, can you

14 name any difference for me?

15 A. Not off the top of my head.

16 Q. Okay. Now, let's go to paragraph 9

17 of your supplemental declaration.

18 So here, in the first sentence, do

19 you see you talk about -- you use the phrase "a

20 wind-down or, more drastically, a full retail

21 liquidation."

22 Do you see that?

23 A. Yes.

24 Q. What do you mean by a full retail

25 liquidation?

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1 GRIFFITH

2 Q. Okay. Let's go to paragraph 13 of

3 your supplemental declaration, please.

4 So you recall you were asked some

5 questions earlier about L/Cs?

6 A. Yes.

7 Q. And do you see, in the middle of

8 paragraph 13, you said, "In a liquidation

9 scenario, letters of credit are almost always

10 fully drawn or fully cash collateralized

11 because leaving undrawn amounts exposes the

12 counterparties"?

13 A. Yes.

14 Q. In your view, are letters of credit

15 almost always fully drawn in an orderly

16 liquidation scenario?

17 A. They potentially would be, yes.

18 Q. But they would potentially not be,

19 correct?

20 MR. GENENDER: Objection, form.

21 A. I would assume that they would be

22 drawn if you're in a liquidation and maybe not

23 able to perform under the obligations that are

24 associated with those L/Cs.

25 Q. So is it your testimony that, in an

1 GRIFFITH  
2 orderly chapter 11 liquidation scenario,  
3 letters of credit are almost always fully  
4 drawn?  
5 A. At some point, they may be. It  
6 would depend on -- it would depend on if the  
7 estate is administratively solvent or not, and  
8 if they are able to continue to perform their  
9 duties under the obligations of those L/Cs.  
10 Q. Okay. So in an orderly chapter 11  
11 scenario, letters of credit may be fully drawn,  
12 correct?  
13 MR. GENENDER: Objection, form,  
14 misstates.  
15 A. Yes.  
16 Q. And what's the basis of your view  
17 that, in an orderly chapter 11 scenario,  
18 letters of credit may be fully drawn?  
19 A. They represent obligations that are  
20 real and would need to be funded at some point  
21 by somebody, and in that scenario, if the  
22 estate is running out of money, the L/Cs may be  
23 drawn by the lenders -- I'm sorry -- by the  
24 counterparties to cover those liabilities.  
25 MO MR. LIUBICIC: I move to strike.

1 GRIFFITH  
2 Q. Again, I'm asking for the basis of  
3 your view.  
4 What's your basis, experience,  
5 education, something else?  
6 A. My understanding is Circuit City  
7 still has litigation going on around their  
8 L/Cs, and it's been a while. It's part of it.  
9 Discussions with colleagues. That's kind of  
10 the basis.  
11 Q. You are a fact witness, right?  
12 A. I am.  
13 Q. Are you personally involved in the  
14 Circuit City case?  
15 A. I am not.  
16 Q. And discussions with colleagues,  
17 who's that?  
18 A. People within the firm.  
19 Q. Within M-III?  
20 A. Yes.  
21 Q. And who's that?  
22 A. Bill Murphy, Colin Adams. They are  
23 the two I would note.  
24 Q. Can you point me to any instance, in  
25 an orderly chapter 11 liquidation, of a

1 GRIFFITH  
2 retailer where letters of credit were fully  
3 drawn?  
4 A. I can't say, sitting here, that I  
5 can.  
6 Q. Are you aware of chapter 11  
7 liquidations where substantial letters of  
8 credit remained outstanding and undrawn?  
9 A. I'm not aware. I'm not sure.  
10 Q. Any familiarity with the wind-down  
11 in the Linens & Things case?  
12 A. No.  
13 Q. How much of the L/Cs were drawn as  
14 of the petition date in the aggregate?  
15 A. I am not exactly sure.  
16 Q. You would agree with me that it was  
17 public knowledge, at certain points in this  
18 chapter 11 case, that the debtors were taking  
19 the position that they might have to pivot to a  
20 liquidation?  
21 A. Could you restate the question?  
22 Q. Sure. You would agree with me that  
23 it was public knowledge, at certain points in  
24 this chapter 11 case, that the debtors were  
25 taking the position that they might have to

1 GRIFFITH  
2 pivot to a liquidation?  
3 A. That -- yes, that sounds correct.  
4 Q. Would you agree that, in the three  
5 years prior to the filing, approximately 985  
6 Sears stores were closed?  
7 A. I don't know that number.  
8 Q. Would you agree that, in the three  
9 years prior to the filing, hundreds of Sears  
10 stores were closed?  
11 A. It's possible.  
12 Q. You don't know?  
13 A. I don't know the number.  
14 Q. Would you agree that, as of the  
15 filing date, Sears had approximately 687  
16 stores? Does that sound about right?  
17 A. Approximately.  
18 Q. And would you agree that during this  
19 case, there have been approximately 262 GOB  
20 sales at Sears stores?  
21 A. That sounds right, yes.  
22 Q. From the petition date to the date  
23 of the closing of the sale to ESL, how much was  
24 drawn under the L/Cs in the aggregate, do you  
25 know?

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1 GRIFFITH  
2 A. I don't know that number.  
3 Q. Does 9 million sound about right?  
4 A. I don't have a basis for it.  
5 Q. If a letter of credit is drawn to  
6 cover a contingent liability, but the liability  
7 doesn't ultimately occur, would you expect that  
8 the proceeds of the letter of credit would be  
9 returned?  
10 A. At the end of any period, where the  
11 liability could actually be recognized, then  
12 yes.  
13 Q. Are you familiar with the letter of  
14 credit and reimbursement agreement for the  
15 \$273 million standalone L/C facility?  
16 A. Could you say that again?  
17 Q. Sure. Are you familiar with the  
18 letter of credit and reimbursement agreement  
19 for the \$273 million standalone L/C facility?  
20 A. I'm aware of it. I'm not versed in  
21 it.  
22 Q. Have you ever read it?  
23 A. I have not.  
24 Q. Are debtors paying claims on L/Cs  
25 currently?

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1 GRIFFITH  
2 A. The debtors are not.  
3 Q. Were the letters of credit assumed  
4 as part of the APA that closed on February 11?  
5 A. They were.  
6 Q. And does that fact have significance  
7 to you when it comes to the question of whether  
8 the L/Cs should be considered funded debt?  
9 A. It does.  
10 Q. And why is that?  
11 A. Because Transform is paying  
12 liabilities or obligations that are due under  
13 those L/Cs on behalf of the debtors.  
14 Q. How much in liabilities or  
15 obligations is due under those L/Cs that  
16 Transform is paying?  
17 A. A significant amount.  
18 Q. Do you know the amount?  
19 A. The L/Cs are typically based on  
20 sized on actuarial reports that tell you, for  
21 workers' comp and auto, what is likely to  
22 occur. So I would say it must be in the  
23 neighborhood of what the L/C balances are.  
24 Q. And your basis for saying that is  
25 what?

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1 GRIFFITH  
2 A. My general understanding of how the  
3 workers' comp and auto liability claims have  
4 been handled by the estate in the past.  
5 Q. Do you have personal knowledge of  
6 any amounts that Transform is actually paying  
7 as you sit here today?  
8 A. We were involved post closing when  
9 claims started to arise, and there was  
10 discussions that maybe the L/Cs would be drawn.  
11 We then worked with Transform to  
12 understand if they were going to be paying  
13 those obligations.  
14 MO MR. LIUBICIC: I will move to strike  
15 as non-responsive.  
16 Q. Do you have personal knowledge of  
17 any amounts that Transform is actually paying  
18 as you sit here today?  
19 A. There were discussions of amounts  
20 that they were picking up, yes.  
21 Q. Do you have any detail beyond that?  
22 A. I don't have it on the top of my  
23 head as I sit here.  
24 Q. Do you recall being asked some  
25 questions about post-petition interest?

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1 GRIFFITH  
2 A. Yes.  
3 Q. Can you point me to any authority  
4 supporting the idea that you can include  
5 post-petition interest when measuring the  
6 amount of a claim as of the petition date?  
7 MR. GENENDER: Objection, form,  
8 misstates the evidence.  
9 A. I don't think that was the purpose.  
10 Q. Do you understand my question?  
11 A. In order to calculate diminution,  
12 there has to be a change in time, and this is  
13 the bare minimum amount of time we're assuming  
14 to do liquidation, which is why there's a claim  
15 there. It's not meant to be as of the petition  
16 date.  
17 Q. What's not meant to be as of the  
18 petition date?  
19 A. The post-petition interest.  
20 Q. So understanding that your view is  
21 it's not supposed to be as of the petition  
22 date, I want to ask you my question again.  
23 Are you aware of any authority in  
24 the literature supporting the idea that you can  
25 include post-petition interest when measuring

<p style="text-align: right;">Page 185</p> <p>1 GRIFFITH</p> <p>2 the amount of a claim as of the petition date?</p> <p>3 MR. GENENDER: Objection, misstates</p> <p>4 the evidence.</p> <p>5 A. And I am not aware.</p> <p>6 Q. Mr. Griffith, one of your</p> <p>7 disagreements with Ms. Murray, as I understand</p> <p>8 it from your supplemental declaration, is her</p> <p>9 use of an 88.77 percent of NOLV for valuing</p> <p>10 Sears inventory; is that correct?</p> <p>11 A. That's correct.</p> <p>12 Q. And you understand that that</p> <p>13 88.7 percent NOLV percentage comes from a Tiger</p> <p>14 appraisal dated September 28, 2018?</p> <p>15 A. That sounds correct.</p> <p>16 Q. I'm going to ask you this way just</p> <p>17 to shortcut it. I can show you the declaration</p> <p>18 if you want.</p> <p>19 Do you recall saying, in your</p> <p>20 supplemental declaration, that the 88.7 percent</p> <p>21 is not an appropriate metric?</p> <p>22 A. Yes.</p> <p>23 Q. Now, do you recall a few minutes ago</p> <p>24 you made some points about Ms. Murray's</p> <p>25 analysis based on using numbers contained in</p>	<p style="text-align: right;">Page 186</p> <p>1 GRIFFITH</p> <p>2 the Riecker declaration of November 23?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. As far as I can tell, your</p> <p>5 supplemental declaration doesn't say anything</p> <p>6 about that analysis. Am I right about that?</p> <p>7 A. We just mentioned that there was</p> <p>8 incorrect or misapplied data taken from other</p> <p>9 sources.</p> <p>10 Q. Okay. And where are you reading</p> <p>11 from when you said that?</p> <p>12 A. Page 4, paragraph 6.</p> <p>13 Q. Okay. So your statement about</p> <p>14 incorrect or misapplied data taken from other</p> <p>15 sources is meant to capture Ms. Murray's</p> <p>16 analysis based on the Riecker declaration?</p> <p>17 MR. GENENDER: Asked and answered.</p> <p>18 A. Yes.</p> <p>19 Q. Do you say anything else in your</p> <p>20 supplemental declaration about that analysis?</p> <p>21 MR. GENENDER: Object to form,</p> <p>22 speaks for itself.</p> <p>23 A. I'm not sure if I do or not.</p> <p>24 Q. Let's take a look at the Murray</p> <p>25 report, which is Exhibit 17. And if you go to</p>
<p style="text-align: right;">Page 187</p> <p>1 GRIFFITH</p> <p>2 paragraph 84, please, it's on page 32.</p> <p>3 A. Okay.</p> <p>4 Q. So do you recognize this discussion</p> <p>5 in paragraph 84?</p> <p>6 A. Could you state that, restate that?</p> <p>7 Q. Yeah. Do you recognize the</p> <p>8 discussion in paragraph 84? Have you read it?</p> <p>9 A. I have read this report, yes.</p> <p>10 Q. And did you read paragraph 84 before</p> <p>11 submitting your supplemental declaration?</p> <p>12 A. I did.</p> <p>13 Q. And could you go to the appendices</p> <p>14 for the report, specifically appendix C2, which</p> <p>15 would be on page 67?</p> <p>16 A. Okay.</p> <p>17 Q. And do you understand that appendix</p> <p>18 C2 is the -- is Ms. Murray's calculation using</p> <p>19 the number from the Riecker declaration?</p> <p>20 A. I see that.</p> <p>21 Q. Okay. And you reviewed appendix C2</p> <p>22 prior to submitting your supplemental</p> <p>23 declaration?</p> <p>24 A. I have.</p> <p>25 Q. Okay. And now could you please</p>	<p style="text-align: right;">Page 188</p> <p>1 GRIFFITH</p> <p>2 restate for me what you told me earlier about</p> <p>3 this analysis? I think you -- I think you</p> <p>4 mentioned perhaps something was misapprehended</p> <p>5 about the gross book value or -- could you fill</p> <p>6 me in on that?</p> <p>7 MR. GENENDER: Objection, asked and</p> <p>8 answered.</p> <p>9 A. Yeah. I believe that the amount</p> <p>10 here is the gross book value or an</p> <p>11 approximation for it.</p> <p>12 Q. And when you say the amount, you</p> <p>13 mean what?</p> <p>14 A. The inventory value as it's listed</p> <p>15 here appears to approximate the gross book</p> <p>16 value.</p> <p>17 Q. So you are looking at appendix C2;</p> <p>18 am I right?</p> <p>19 A. I am.</p> <p>20 Q. Okay. And you're looking at the</p> <p>21 inventory value of 2.74 billion?</p> <p>22 A. Yes.</p> <p>23 Q. And you believe that's gross book</p> <p>24 value and not an NOLV?</p> <p>25 A. That's my understanding, yes.</p>



<p style="text-align: right;">Page 189</p> <p>1 GRIFFITH</p> <p>2 Q. Why don't we look at the Riecker</p> <p>3 declaration? And that's been previously marked</p> <p>4 as Exhibit 22.</p> <p>5 And in the Riecker declaration, we</p> <p>6 can go to paragraph 8, please.</p> <p>7 A. Okay.</p> <p>8 Q. Do you see several lines up from the</p> <p>9 bottom of page 4, it says, "Around the</p> <p>10 commencement date, the pre-petition ABL</p> <p>11 facility collateral was valued at approximately</p> <p>12 2.8 billion, of which the net orderly</p> <p>13 liquidation value, NOLV, of the debtors'</p> <p>14 inventory was valued at about 2.74 billion,"</p> <p>15 and it goes on?</p> <p>16 A. I see that.</p> <p>17 Q. Okay. Is there anything inaccurate</p> <p>18 about this statement from Mr. Riecker that was</p> <p>19 filed with the court?</p> <p>20 A. It would appear that 2.74 billion is</p> <p>21 not accurate.</p> <p>22 Q. And your basis for that is?</p> <p>23 A. Number one, the value of the estate</p> <p>24 above it, 2.8 billion, to have an NOLV that's</p> <p>25 only reduced by less than a point or two</p>	<p style="text-align: right;">Page 190</p> <p>1 GRIFFITH</p> <p>2 wouldn't really make sense to me, and the fact</p> <p>3 that I think, as I mentioned in our -- my</p> <p>4 supplemental declaration, the gross book value</p> <p>5 of the collateral as of the petition date was</p> <p>6 2.746 billion.</p> <p>7 Q. So is it your testimony that you</p> <p>8 believe Mr. Riecker simply submitted an</p> <p>9 inaccurate declaration to the court?</p> <p>10 MR. GENENDER: Objection, form.</p> <p>11 A. I'm not sure what -- I was not part</p> <p>12 of this declaration, but I know, as a fact,</p> <p>13 what the gross book value was as of the</p> <p>14 petition date, and that's 2.746, approximate.</p> <p>15 Q. Prior to your involvement with this</p> <p>16 current 507(b) and 506(c) dispute, did you ever</p> <p>17 read this declaration?</p> <p>18 A. I can't say that I did.</p> <p>19 Q. Did you ever hear any of your</p> <p>20 colleagues along, you know, since November of</p> <p>21 2018, mention that Mr. Riecker had submitted a</p> <p>22 declaration that had an incorrect figure in?</p> <p>23 A. Not to my knowledge, no.</p> <p>24 Q. Turning back to paragraph 84 of</p> <p>25 Ms. Murray's report, Exhibit 17.</p>
<p style="text-align: right;">Page 191</p> <p>1 GRIFFITH</p> <p>2 MR. GENENDER: Put Riecker away for</p> <p>3 a minute?</p> <p>4 MR. LIUBICIC: Yeah.</p> <p>5 A. I'm sorry. What page?</p> <p>6 MR. GENENDER: It's paragraph 84.</p> <p>7 Q. That's page 32.</p> <p>8 Mr. Griffith, before I ask about</p> <p>9 paragraph 84, this discussion we've had about</p> <p>10 your claimed error in Mr. Riecker's</p> <p>11 declaration, why didn't you say anything about</p> <p>12 that in your supplemental declaration?</p> <p>13 A. We do mention that there was -- the</p> <p>14 reports rely on incorrect or misapplied data</p> <p>15 taken from other sources. That's -- we weren't</p> <p>16 part of this declaration. I don't want to</p> <p>17 speak for it, so.</p> <p>18 Q. Why didn't you say, in your</p> <p>19 supplemental declaration, that you believe</p> <p>20 Ms. Murray's analysis, based on Mr. Riecker's</p> <p>21 number, was flawed, because you believe</p> <p>22 Mr. Riecker's number itself was incorrect, why</p> <p>23 didn't you say that?</p> <p>24 A. I'm not sure we found it necessary</p> <p>25 to, but I don't know.</p>	<p style="text-align: right;">Page 192</p> <p>1 GRIFFITH</p> <p>2 Q. You wrote your supplemental</p> <p>3 declaration, right?</p> <p>4 A. I did.</p> <p>5 Q. Okay. So you -- and you were aware</p> <p>6 at the time that you wrote your supplemental</p> <p>7 declaration that Mr. Riecker's number was</p> <p>8 allegedly in error?</p> <p>9 A. When I -- when I referenced it, when</p> <p>10 I did look at it, I wasn't sure that I could</p> <p>11 figure out how you would ever get to that</p> <p>12 number. I don't know what his source was, so I</p> <p>13 don't know.</p> <p>14 MO MR. LIUBICIC: Move to strike.</p> <p>15 Q. Were you aware, at the time that you</p> <p>16 wrote your supplemental declaration, that</p> <p>17 Mr. Riecker's number was allegedly in error?</p> <p>18 A. It appeared inaccurate, yes.</p> <p>19 Q. So you made a choice not to say</p> <p>20 anything about it in your supplemental</p> <p>21 declaration, right?</p> <p>22 MR. GENENDER: Objection,</p> <p>23 argumentative, asked and answered.</p> <p>24 A. It's not part of our analysis.</p> <p>25 Q. That's not my question.</p>

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1 GRIFFITH  
2 You made a choice not to put it in  
3 your supplemental declaration, right?  
4 MR. GENENDER: Objection, asked and  
5 answered.  
6 A. Yes, we did not reference that in  
7 the supplemental.  
8 Q. And now looking at paragraph 84 of  
9 Ms. Murray's report, do you see the -- starting  
10 in the second sentence of that paragraph,  
11 Ms. Murray said she requested supporting  
12 documentation for the \$2.74 billion figure?  
13 A. Okay.  
14 Q. And then she discusses a nine-page  
15 collection of documents dated October 17, 2018,  
16 and a calculation she made based on those?  
17 A. Okay.  
18 Q. Do you see that?  
19 A. I do see it.  
20 Q. Did you review those documents --  
21 those documents that Ms. Murray is discussing  
22 here, the nine-page collection of documents?  
23 A. I'm not sure what that is.  
24 Q. So you haven't reviewed it, if  
25 you're not sure what it is, right?

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1 GRIFFITH  
2 A. I think that's possible.  
3 Q. You have no recollection of  
4 reviewing it, right?  
5 A. I don't know what it is.  
6 Q. Well, you understand she cited it in  
7 her report, right?  
8 MR. GENENDER: Objection, misstates  
9 the record.  
10 A. I don't see the cite in that  
11 sentence.  
12 Q. If you can turn to appendix C3. You  
13 see footnote 146?  
14 A. I do.  
15 Q. Do you recall reviewing that  
16 document?  
17 A. I can't say that I did.  
18 Q. Were you familiar with Tiger prior  
19 to this case?  
20 A. Prior to this case?  
21 Q. Yeah.  
22 A. I knew who they were.  
23 Q. Would you agree that Tiger is  
24 knowledgeable about the inventory value of  
25 Sears inventory?

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1 GRIFFITH  
2 A. Yes.  
3 Q. Did debtors ever rely on Tiger data  
4 during this chapter 11 case?  
5 A. Yes.  
6 Q. In what context?  
7 A. It was used for the borrowing base  
8 advance rates.  
9 Q. And in any other context?  
10 A. Not that I can think of sitting  
11 here.  
12 Q. Do you understand that Tiger was  
13 hired to prepare its appraisals for the first  
14 lien ABL lenders to appraise the inventory that  
15 was their collateral?  
16 A. Yes.  
17 Q. Did you review any Tiger appraisals  
18 prior to the debtors' decision to seek approval  
19 of a going concern sale with ESL?  
20 A. I have reviewed Tiger reports in the  
21 past, yes.  
22 Q. And prior to the debtors' decision  
23 to seek approval of a going concern sale with  
24 ESL, did you ever have discussions with the ABL  
25 lenders or their advisors?

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1 GRIFFITH  
2 A. Can you restate that question?  
3 Q. Yeah. So prior to the debtors'  
4 decision to seek approval of the going concern  
5 sale with ESL, did you ever have discussions  
6 with the ABL lenders or any of their advisors?  
7 A. We had spoken with the ABL lenders  
8 in the past, and their advisors, yes.  
9 Q. And did you ever tell the ABL  
10 lenders or their advisors that any of Tiger's  
11 NOLV projections were wrong?  
12 A. We may have disagreed with them and  
13 we did tell them that, yes.  
14 Q. Okay. When did you tell them that?  
15 A. Over the course of the case and  
16 prior to the case commencing.  
17 Q. Which NOLV -- which Tiger NOLV  
18 projections did you tell the ABL lenders were  
19 wrong?  
20 A. I don't recall, but I believe it was  
21 leading up to the filing, as they were reducing  
22 the value.  
23 Q. And did you tell the ABL lenders  
24 that they were overstated or understated?  
25 A. Our opinion was, at the time and

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1 GRIFFITH  
2 prior to the filing, that the NOLVs were  
3 conservative.  
4 Q. And then post petition, did you ever  
5 tell the ABL lenders or their advisors that you  
6 disagreed with any of Tiger's NOLVs?  
7 A. Not that I can recall.  
8 Q. You would agree with me Tiger valued  
9 only inventory that was designated as eligible?  
10 A. I believe that's correct.  
11 Q. Would you agree that Tiger didn't  
12 ascribe value to certain categories of  
13 inventory that were deemed ineligible?  
14 A. Could you give me an example?  
15 Q. Live plants.  
16 A. Sounds reasonable. I'm not  
17 positive.  
18 Q. Are you familiar with the concept of  
19 ineligible inventory and eligible inventory?  
20 A. Yes.  
21 Q. Do you believe, as a general matter,  
22 that ineligible inventory is worth zero?  
23 A. It's hard to say.  
24 Q. Would you agree that -- would you  
25 agree with me that, depending on the

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1 GRIFFITH  
2 circumstances, ineligible inventory can be  
3 worth more than zero?  
4 A. I think it's possible.  
5 Q. Are you familiar with the  
6 January 2019 wind-down analysis prepared by the  
7 debtors and their advisors?  
8 A. I'd have to see it. I don't know if  
9 I could say that.  
10 Q. Do you recall a wind-down analysis  
11 that was discussed at the sale hearing?  
12 A. I'm sure there was. I'm not -- I  
13 can't say that I'm familiar with the document.  
14 Q. Okay. Do you recall Ms. Murray  
15 discussing the January 2019 wind-down analysis  
16 in her report?  
17 A. I'm not positive.  
18 Q. Okay. In the Murray report,  
19 Exhibit 17, let's go to paragraph 85.  
20 And do you see, in the second  
21 sentence, Ms. Murray said, "The January 14,  
22 2019, wind-down analysis prepared by Mr. Meghji  
23 indicated that the debtors believe that the  
24 NOLV of the inventory at that time was  
25 approximately 90 percent after taking into

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1 GRIFFITH  
2 account selling costs"?  
3 A. I see that.  
4 Q. Okay. When you read this discussion  
5 in Ms. Murray's report, did you go and take a  
6 look at the wind-down analysis?  
7 A. I believe I did.  
8 Q. Would that 90 percent NOLV from the  
9 wind-down analysis be an appropriate metric to  
10 use in the 507(b) exercise we're engaged in?  
11 A. I don't believe so.  
12 Q. And why is that?  
13 A. I'm not sure that that takes all the  
14 costs associated with the full liquidation and  
15 bankruptcy into account.  
16 Q. And what diligence did you do to  
17 look into whether the wind-down analysis does  
18 or does not take all of the costs into account?  
19 A. I would say we did. We believed in  
20 the methodology we've been using.  
21 Q. You would say we did what, due  
22 diligence?  
23 A. No. I'm saying that we maintained  
24 that the fair market value of 85 percent is the  
25 appropriate level.

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1 GRIFFITH  
2 Q. I understand. But my question was,  
3 what diligence did you do to look into whether  
4 the wind-down analysis does or does not take  
5 all of the costs into account?  
6 A. I'm not -- I'm not sure we did an  
7 extremely diligenced review of that based on  
8 this.  
9 Q. Did you personally do any diligence  
10 into that?  
11 A. I believe we looked at it. I looked  
12 at it. But I didn't dig very deep on it.  
13 Q. Are you familiar with the  
14 January 2019 UCC presentation titled  
15 "Illustrative Recovery Considerations" that was  
16 presented at the sale hearing?  
17 A. Do you have a copy of it?  
18 Q. I'm trying to short circuit this.  
19 It's late.  
20 MR. GENENDER: Answer his question,  
21 if you can.  
22 A. I don't know.  
23 Q. You testified at the sale hearing,  
24 right?  
25 MR. GENENDER: He did not.

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1 GRIFFITH  
2 MR. LIUBICIC: No? Okay.  
3 MR. GENENDER: Sorry for  
4 interrupting.  
5 Q. Let's look in the Murray report at  
6 paragraph 87 on page 33.  
7 Do you see that Ms. Murray is  
8 discussing a January UCC presentation titled  
9 "Illustrative Recovery Considerations"?  
10 A. I see that.  
11 Q. And do you see she said that, "In  
12 building up the recoveries in a liquidation  
13 analysis, the UCC advisors assumed that 425 of  
14 the debtors' stores would conduct GOB sales  
15 with the assistance of Abacus and SB306, and  
16 that the debtors would achieve NOLVs of  
17 approximately 90 percent with upside."  
18 Do you see that?  
19 A. I see that.  
20 Q. Did you go and look at that UCC  
21 analysis after reading Ms. Murray's report?  
22 A. I don't believe I did.  
23 Q. Okay. Let's go back to your  
24 supplemental declaration, please, and  
25 specifically paragraph 9, which is on page 7.

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1 GRIFFITH  
2 (Griffith Exhibit 23, Project Blue -  
3 Liquidation Bids Review, Dated December  
4 2018, marked for identification.)  
5 Q. And how is that different from  
6 what's going on in a fee-based bid?  
7 A. If the recoveries come in lower,  
8 that's the problem for the company as opposed  
9 to the liquidator.  
10 Q. I'm handing you what's been marked  
11 as Exhibit 23, which is a deck titled "Project  
12 Blue - Liquidation Bids Review," dated  
13 December 2018.  
14 A. Okay.  
15 Q. Are you familiar with this document?  
16 A. I can't say that I really have spent  
17 time with it, no.  
18 Q. Have you ever seen it? You can take  
19 a minute to look at it if you want, obviously.  
20 A. (Document review.) Okay.  
21 Q. Have you ever seen this document?  
22 A. I may have.  
23 Q. Okay. Let's look at slide 2. So do  
24 you see, in the first bullet, it says, "The  
25 company received bids to GOB liquidate its

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1 GRIFFITH  
2 A. Okay.  
3 Q. So do you see here, in paragraph 9,  
4 Mr. Griffith, you discuss a number of risks and  
5 then you say, in the middle of the paragraph,  
6 "The market's view of such risks is reflected  
7 in the equity bids' guaranteed rates received  
8 by the debtors during the sale, suggesting a  
9 collateral value of 79 to 82 percent?"  
10 A. I do.  
11 Q. Who submitted equity bids to the  
12 debtors?  
13 A. I believe it's Tiger, and I don't  
14 know who else. I guess we can go to the  
15 exhibit.  
16 Q. Were fee-based bids submitted to the  
17 debtors?  
18 A. I believe there may have been.  
19 Q. Who submitted fee-based bids?  
20 A. I don't know the answer to that.  
21 Q. What's the difference between a  
22 fee-based bid and an equity bid?  
23 A. The equity, they're guaranteeing the  
24 recovery level.  
25 MR. LIUBICIC: Could we mark this?

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1 GRIFFITH  
2 remaining 425-store footprint on a guarantee of  
3 proceeds or equity bid basis and an advisory  
4 basis"?  
5 A. Yes.  
6 Q. Do you know if advisory basis is the  
7 same thing as a fee-based basis?  
8 A. I can't say that I know that.  
9 Q. Then do you see it says, "The  
10 presentation evaluates the liquidation bids in  
11 the following order," and the bullet below that  
12 says, "Company self-run liquidation with Abacus  
13 continuing to serve as liquidation advisor"?  
14 A. I see that.  
15 Q. Were you aware that Abacus had been  
16 Sears' liquidation advisor up to this point?  
17 A. Yes.  
18 Q. Were you aware that Abacus had  
19 historically liquidated hundreds of Sears and  
20 Kmart locations prior to the petition date?  
21 A. Yes.  
22 Q. Was it Abacus that handled the  
23 liquidation of 200 plus GOB stores during this  
24 case?  
25 A. Yes.

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1 GRIFFITH  
2 Q. You would agree that Abacus was  
3 highly experienced in running GOB sales for  
4 Sears?  
5 A. Yes.  
6 Q. Okay. Let's go to slide 3.  
7 Do you see the first bullet says,  
8 "Abacus and the company project a final net  
9 orderly liquidation value for remaining  
10 merchandise of 90.2 percent and 90.3 percent  
11 before liquidation fees based on most recently  
12 available inventory data"?  
13 A. I think you misspoke on the second  
14 number.  
15 Q. The second number should be  
16 93.7 percent.  
17 A. I see that.  
18 Q. Did M-III have any involvement in  
19 this project? Because -- I ask because it says  
20 "Abacus and the company project."  
21 A. I don't know.  
22 Q. Can you go to slide 4, please?  
23 Do you see slide 4 appears to lay  
24 out two equity bids?  
25 A. Yes.

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1 GRIFFITH  
2 Q. And do you see the first bullet  
3 says, "Both equity bids are conditioned on  
4 working with the other liquidators and include  
5 cost factor adjustment which the company  
6 specifically requested not be included in the  
7 agreements"?  
8 Do you see that?  
9 A. I do.  
10 Q. What's a cost factor adjustment?  
11 A. I don't think I can answer that.  
12 Q. If you go to the last slide of the  
13 deck, please.  
14 I'm sorry, Mr. Griffith, just one  
15 more thing on slide 4.  
16 Do you see the two equity bids are  
17 from, one, Hilco/Gordon Brothers and the other  
18 from Tiger/Great American?  
19 A. Yes.  
20 Q. Now let's go to the last slide of  
21 the deck.  
22 And do you see it says, in the first  
23 bullet, "Hilco/Gordon Brothers and Tiger/Great  
24 American submitted bids that do not meet the  
25 definition of a performing bid because both

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1 GRIFFITH  
2 bids have cost factor adjustment language"?  
3 A. Okay.  
4 Q. Do you see that?  
5 A. I see that.  
6 Q. Were you aware that the equity bids  
7 did not meet the company's definition of a  
8 conforming bid?  
9 A. I know that that's what they  
10 believed the market to be. That's why they bid  
11 the way they bid. I was not aware of that  
12 non-conforming language.  
13 Q. So you were not aware that the  
14 equity bids were non-conforming?  
15 A. That's right.  
16 Q. Okay. And then you see in the third  
17 bullet -- I'm sorry -- in the dashed bullet  
18 immediately below the first bullet, do you see  
19 it says, "Both equity bids provide a guaranteed  
20 payout that is significantly lower than the net  
21 recovery before liquidator fees projected to be  
22 achieved in a self-liquidation/final GOB  
23 process"?  
24 A. I see that.  
25 Q. Okay. I think we're done with that

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1 GRIFFITH  
2 document.  
3 MR. GENENDER: For the record, we  
4 need to replace 23. The witness  
5 inadvertently wrote on it.  
6 (Griffith Exhibit 24, Minutes of a  
7 Meeting of the Restructuring Committee,  
8 Dated January 5, 2019, marked for  
9 identification.)  
10 Q. I have handed you what's been marked  
11 as Exhibit 24.  
12 Do you recognize these as minutes of  
13 a meeting of the restructuring committee, dated  
14 January 5, 2019?  
15 A. Yes.  
16 Q. And if you look in the paragraph  
17 under the heading "Materials Provided," the  
18 text paragraph, do you see this references your  
19 attendance at this meeting?  
20 A. Yes, I see that.  
21 Q. Do you recall attending this meeting  
22 of the restructuring committee?  
23 A. There's been a lot of meetings. I'm  
24 not sure I can recall this one specifically.  
25 Q. Do you see the bottom paragraph, it

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1 GRIFFITH  
2 says, "Mr. Shrock reported on the status of  
3 the liquidator proposals"?  
4 A. I see that.  
5 Q. And do you see it says, "He  
6 recommended that the committee proceed with a  
7 liquidation advisory team consisting of Abacus  
8 advisors and SB360 Capital Partners in the  
9 event of a wind-down?"  
10 A. I do.  
11 Q. Okay. Do you recall attending a  
12 meeting where this was discussed?  
13 A. It's possible. We had a lot of  
14 these meetings.  
15 Q. Do you have any specific  
16 recollection of attending this meeting where  
17 this was discussed?  
18 A. I don't have a specific  
19 recollection.  
20 Q. And you would agree with me that  
21 Abacus and SB360 did not submit equity bids?  
22 MR. GENENDER: Objection, form.  
23 A. Not that I'm aware of.  
24 Q. Did this recommendation from  
25 Mr. Shrock ever change, to your knowledge?

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1 GRIFFITH  
2 A. Once we got to a going concern sale.  
3 Q. What I mean is, to your knowledge,  
4 did Mr. Shrock's recommendation that, in the  
5 event of a wind-down of the company, go with  
6 Abacus and SB360, did that recommendation ever  
7 change?  
8 A. I don't know the answer to that.  
9 Q. You are not aware of it changing,  
10 correct?  
11 A. I am not.  
12 Q. And the wind-down that was being  
13 discussed at this point, that was an orderly  
14 wind-down in a chapter 11, correct?  
15 A. I'm not positive.  
16 Q. In January of 2019, before the  
17 debtors made the decision to go with a going  
18 concern sale to ESL, the wind-down that was  
19 being discussed was going to be an orderly  
20 wind-down, correct?  
21 MR. GENENDER: Objection, asked and  
22 answered.  
23 A. I'm not sure. I mean, if you wound  
24 up administratively insolvent, I don't know if  
25 you have a choice.

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1 GRIFFITH  
2 Q. Okay. In January of 2019, do you  
3 believe the estates were administratively  
4 insolvent?  
5 A. I don't believe so, but I don't know  
6 that for a fact. I don't.  
7 Q. The wind-down analysis that was  
8 prepared in January of 2019, do you know if  
9 that assumed an orderly liquidation in a  
10 chapter 11?  
11 MR. GENENDER: Objection, lack of  
12 foundation.  
13 A. I don't know.  
14 Q. The UCC analysis we talked about,  
15 January 2019, discussed at the sale hearing,  
16 didn't that assume an orderly liquidation in  
17 the chapter 11?  
18 MR. GENENDER: Objection, lack of  
19 foundation.  
20 A. I would need to see the document. I  
21 don't know.  
22 Q. Now, the equity bids that you  
23 discuss in paragraph 9 of your supplemental  
24 declaration that you say suggest a collateral  
25 value of 79 to 82 percent --

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1 GRIFFITH  
2 A. Yes.  
3 Q. -- do you know if those bids had a  
4 potential upside embedded in them beyond the  
5 guarantee recoveries?  
6 A. It potentially did.  
7 Q. There would be 50/50 sharing with  
8 the debtors of any recoveries beyond a certain  
9 level, correct?  
10 A. After they recover their fee as  
11 well, there would be some split, yes.  
12 Q. In your experience, how common is it  
13 for equity bids to have that type of upside  
14 sharing component?  
15 A. I don't have a point of view on  
16 that.  
17 Q. Okay. Because you don't have enough  
18 experience to know the answer to that, correct?  
19 A. I don't know the answer to that,  
20 yes.  
21 Q. Because you don't have enough  
22 experience with these kinds of bids to know the  
23 answer to that, correct?  
24 MR. GENENDER: Objection, form.  
25 A. Yeah, I think that's -- yes.



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1 GRIFFITH  
2 Q. You would agree that, if those  
3 sharing levels were achieved, debtors' recovery  
4 would be greater than the 79 to 82 percent you  
5 lay out in paragraph 9?  
6 MR. GENENDER: Objection, calls for  
7 speculation.  
8 A. Yeah, I don't know. I can't answer  
9 that.  
10 Q. And you don't have the experience to  
11 know when a retailer engages a liquidator on an  
12 equity bid basis, how common it is for sharing  
13 levels to be hit, right?  
14 A. I don't personally, no.  
15 Q. And you are not able to say under  
16 oath today that if debtors pivoted to a  
17 liquidation and selected one of those equity  
18 bids, that sharing levels would not have been  
19 achieved, correct?  
20 A. I can't say for certain one way or  
21 the other, no.  
22 Q. Are you aware of any recent retail  
23 businesses that have done liquidations?  
24 A. I am aware.  
25 Q. Okay. Which ones?

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1 GRIFFITH  
2 A. Toys 'R Us comes to mind.  
3 Q. Any others?  
4 A. Not off the top of my head, no.  
5 Q. Okay. Toys 'R Us, was their  
6 liquidator engaged on an equity bid basis or on  
7 a fee basis, do you know?  
8 A. I don't know.  
9 Q. And in the world of retailer  
10 liquidations, is it more typical to see a  
11 liquidator engaged on an equity bid basis or  
12 fee basis? You don't know, right?  
13 MR. GENENDER: Which question are  
14 you asking? Compound.  
15 Q. Is it more typical to see a  
16 liquidator engaged on an equity bid basis or on  
17 a fee basis?  
18 A. Under what scenario?  
19 Q. In a liquidation of a retailer.  
20 A. I'm not positive.  
21 Q. Okay. Let's look at paragraph 8 of  
22 your supplemental declaration. And I'm looking  
23 at the third sentence.  
24 Do you see it says, "The Tiger  
25 appraisal only deducts direct sale expenses and

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1 GRIFFITH  
2 a limited subset of non-direct sale expenses,  
3 including royalty payments, base liquidation  
4 fees and corporate overhead required to support  
5 the retail GOB sales"?  
6 A. Yes.  
7 Q. Mr. Griffith, you have got in front  
8 of you the Tiger appraisal dated September 28,  
9 2018, which on the cover page says it's as  
10 inventory date of October 6, 2018, and it's  
11 been previously marked as Exhibit 11. And  
12 could you go to page 6, please?  
13 Do you see the heading "Sale  
14 Expenses"?  
15 A. I do.  
16 Q. And it says, "Expenses for the  
17 retail GOB inventory sale included in this  
18 analysis consists of two categories, and the  
19 first is direct sale expenses."  
20 Do you see that?  
21 A. I do.  
22 Q. It says, "Those expenses directly  
23 related to the store locations," right?  
24 A. Yes.  
25 Q. Okay. Has Tiger excluded any

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1 GRIFFITH  
2 expenses directly related to the store  
3 locations that you're aware of?  
4 A. I don't know. I don't have any  
5 direct knowledge of that.  
6 Q. And then if we look at the next  
7 line, non-direct sale expenses," do you see  
8 that?  
9 A. I do.  
10 Q. Are you aware of anything inaccurate  
11 about the explanation of non-direct sale  
12 expenses?  
13 A. Based on what we have seen, I don't  
14 understand that they have all the corporate  
15 overhead included in these numbers.  
16 Q. Right. So you say, in paragraph 8  
17 of your supplemental declaration that the Tiger  
18 appraisal doesn't include what you call full  
19 corporate overhead costs, right?  
20 A. That's right.  
21 Q. What do you mean by full corporate  
22 overhead?  
23 A. Sears is a large organization that  
24 has a lot of corporate overhead. I think it  
25 far exceeds what they have included in their

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1 GRIFFITH  
2 analysis.  
3 Q. Okay. And when you say -- well, is  
4 it your view that full corporate overhead needs  
5 to be included in an NOLV analysis of the  
6 inventory?  
7 A. I think a lot more needs to be  
8 included, yes.  
9 Q. Is there any corporate overhead that  
10 you believe is not properly included in an NOLV  
11 analysis? Would you carve anything out from  
12 corporate overhead?  
13 MR. GENENDER: Objection, compound.  
14 A. I'd have to review the categories.  
15 I don't know.  
16 Q. So when you wrote full corporate  
17 overhead in paragraph 8 of your supplemental  
18 declaration, was there any old corporate  
19 overhead of Sears that you did not have in  
20 mind?  
21 A. Obviously, certain of the  
22 professional fees that were not related to the  
23 sale.  
24 Q. That's not corporate overhead,  
25 right?

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1 GRIFFITH  
2 A. That's right.  
3 Q. Was there any corporate overhead you  
4 did not have in mind?  
5 A. I'd have to go back and look at the  
6 categories.  
7 Q. Do you recall testifying earlier  
8 that you took the position with the ABL lenders  
9 pre-petition that the Tiger NOLVs were  
10 conservative?  
11 A. Yes.  
12 Q. If you felt they were conservative,  
13 how is it that you're now saying that they  
14 should include more corporate overhead?  
15 A. When we were talking to them  
16 initially was when we were as a going concern.  
17 This is in a liquidation scenario.  
18 Q. But what you told the ABL lenders  
19 was the NOLVs in the Tiger appraisals were  
20 conservative, right?  
21 A. At that point in time, yes.  
22 Q. And at that point in time,  
23 pre-petition, the NOLVs did not include any  
24 more overhead than they include on page 6 of  
25 Exhibit 11, correct?

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1 GRIFFITH  
2 A. I don't know the answer to that.  
3 Q. Let's look at paragraph 9 of your  
4 supplemental declaration.  
5 Do you see you said, "A wind-down or  
6 a full retail liquidation would inject  
7 additional uncertainty and risk and reduce  
8 overall recoveries"?  
9 A. Yes.  
10 Q. By how much would a wind-down reduce  
11 overall recoveries?  
12 A. It's hard to say. I don't have that  
13 quantified.  
14 Q. You haven't attempted to quantify  
15 it, right?  
16 A. No, I have not.  
17 Q. Then you say in the next sentence,  
18 "The margins in a fire sale would be lower."  
19 Do you see that?  
20 A. Yes.  
21 Q. How much lower?  
22 A. I don't have that quantified.  
23 Q. Have you ever personally been  
24 engaged in a fire sale liquidation of a  
25 retailer?

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1 GRIFFITH  
2 A. No.  
3 Q. Have you ever personally been  
4 engaged in a chapter 11 orderly liquidation of  
5 a retailer?  
6 A. I have not.  
7 Q. Have you ever been engaged in a  
8 chapter 7 liquidation of a retailer?  
9 A. No.  
10 Q. What analysis did you do to write  
11 what you wrote in paragraph 9?  
12 A. It's just a general understanding of  
13 how these work and the shorter the time frame  
14 and the faster you want to blow through  
15 incremental inventory, the fire sale  
16 environment margins will be lower, recoveries  
17 will be lower.  
18 Q. So just a general understanding of  
19 how liquidations of retailers work?  
20 A. Yes.  
21 Q. And then just above that, at the end  
22 of paragraph 8, you talk about WARN Act  
23 obligations.  
24 What analysis did you do to write  
25 that portion of paragraph 8?

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1 GRIFFITH  
2 A. We just understood. We knew, from  
3 working with the company, that there was a  
4 material amount of WARN Act-related severance  
5 liabilities that would be incurred.  
6 Q. How much WARN Act liability would be  
7 incurred in an orderly liquidation of Sears?  
8 A. I don't have that number here.  
9 Q. Then the last sentence of paragraph  
10 9 you say, "The contemporaneous Tiger report  
11 projected an 85.4 percent NOLV."  
12 Do you see that?  
13 A. I do.  
14 Q. That's from a December 2018 Tiger  
15 report, correct?  
16 A. (Document review.) Yes.  
17 Q. Okay. How is a December 2018 Tiger  
18 report relevant to measuring NOLV as of the  
19 petition date?  
20 A. (Document review.)  
21 I think it was just another data  
22 point.  
23 Q. Okay. So is it relevant to  
24 measuring NOLV as of petition date?  
25 A. It's another data point that you

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1 GRIFFITH  
2 could use.  
3 Q. To measure NOLV as of the petition  
4 date?  
5 A. It's possible, yes.  
6 Q. You would agree with me that it  
7 would make more sense to use a projected NOLV  
8 closer in time to the petition date if we had a  
9 Tiger NOLV closer in time to the petition date?  
10 A. We could use that, yes.  
11 Q. You would agree with me that would  
12 make more sense to use that, if we want to  
13 measure value as of the petition date, right?  
14 A. If we are going to use NOLV, it's  
15 reasonable to do that.  
16 Q. Paragraph 10, you talk about a  
17 chapter 7 liquidation scenario.  
18 Do you see that?  
19 A. I do.  
20 Q. So is this analysis in paragraph 10  
21 also based on your general understanding of  
22 liquidations of retailers?  
23 A. Yes.  
24 Q. Are you aware of any retailers who  
25 have converted their cases to a chapter 7?

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1 GRIFFITH  
2 A. Not off the top of my head, no.  
3 Q. In the practice of valuation, what  
4 is a premise of value? Do you know what that  
5 means?  
6 A. What are you referring to? I'm not  
7 sure.  
8 Q. Are you familiar with the concept of  
9 a premise of value when it comes to valuation  
10 work?  
11 A. I don't know the technical term.  
12 Q. Can you point me to any authority  
13 suggesting it's appropriate to value collateral  
14 as of the petition date based on what someone  
15 might have paid for that collateral about four  
16 months later?  
17 A. No, I can't, not off the top of my  
18 head, no.  
19 Q. Would you agree with me that  
20 collateral values expressed as a percentage of  
21 book value can vary over time?  
22 MR. GENENDER: Objection, form.  
23 A. Can you repeat the question?  
24 Q. Sure. Would you agree with me that  
25 collateral values expressed as a percentage of

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1 GRIFFITH  
2 book value can vary over time?  
3 A. Yes.  
4 Q. Okay. Lets go to paragraph 6 of  
5 your supplemental declaration -- I'm sorry --  
6 page 6 and footnote 2.  
7 MR. GENENDER: There is no footnote  
8 2 on page 6?  
9 MR. LIUBICIC: I'm sorry, guys.  
10 It's late. Footnote 8.  
11 MR. GENENDER: It is late.  
12 Q. You see you said, in footnote 8,  
13 "The 88.7 percent NOLV determined in the Tiger  
14 appraisal is a percentage of net eligible  
15 inventory, which does not include certain  
16 inventory in transit and categories of  
17 inventory that have lower recoveries than  
18 retail store merchandise."  
19 Do you see that?  
20 A. I do.  
21 Q. Are you aware that Ms. Murray took  
22 into account in-transit inventory using a  
23 separate NOLV?  
24 A. I was aware that she was making a  
25 calculation, yes.

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1 GRIFFITH

2 Q. And then, in the next sentence, you

3 say, "The net inventory liquidation value of

4 approximately 2.2 billion in the Cyrus report

5 is approximately 82 percent of total stock

6 ledger inventory."

7 Do you see that?

8 A. I do.

9 Q. And you say that, "Approximately

10 82 percent compares on a like-for-like basis to

11 the 85 percent used by the debtors."

12 Do you see that?

13 A. I do.

14 Q. So how did you get to the

15 82 percent?

16 A. (Document review.)

17 I would have to do the calculation,

18 but I believe it's the two billion one

19 ninety-six over the total gross collateral or

20 total gross inventory balance.

21 Q. Okay. And do you understand that

22 Ms. Murray's position is that her 88.7 percent

23 is net of all costs necessary to monetize and

24 preserve the inventory?

25 MR. GENENDER: Object to the form.

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1 GRIFFITH

2 right?

3 MR. GENENDER: Objection, form.

4 A. It's not, I think, how that works.

5 Q. Okay. How does it work?

6 MR. GENENDER: Objection, form.

7 A. You need to re-ask the question. I

8 don't know what the point is.

9 Q. Okay.

10 MR. LIUBICIC: Our awesome court

11 reporter needs a break.

12 (Recess taken at 7:02 p.m. to

13 7:16 p.m.)

14 BY MR. LIUBICIC:

15 Q. Okay. Mr. Griffith, let's look at

16 paragraph 17 in your supplemental declaration,

17 please.

18 Do you see paragraph 17 is what you

19 call your adjusted Cyrus valuation?

20 A. I do.

21 Q. And you say that, "An analysis which

22 largely adopts the NOLV valuation used in the

23 reports, after certain necessary corrections

24 are made, leads to the conclusion that there

25 was no diminution in value."

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1 GRIFFITH

2 A. Yeah, I'm not positive what it

3 entailed.

4 Q. Okay. You understand Ms. Murray

5 believes the 88.7 percent NOLV includes the

6 costs of maintaining and preserving the

7 inventory.

8 Do you understand that?

9 MR. GENENDER: Objection, form.

10 A. That might be her assumption.

11 Q. That's all I'm asking you.

12 A. That is her assumption.

13 Q. Okay. And your 85 percent figure

14 that you use is not net of all costs necessary

15 to preserve and monetize the collateral, right?

16 A. It's the fair market value that was

17 realized as part of the going concern.

18 MO MR. LIUBICIC: Move to strike.

19 Q. The value you derived using the

20 85 percent figure, that is not net of all costs

21 necessary to preserve and monetize the

22 collateral, right?

23 A. It's not done on that basis.

24 Q. Right. You believe \$1.4 billion of

25 costs need to be subtracted from that value,

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1 GRIFFITH

2 Do you see that?

3 A. Yes.

4 Q. And then you go on to make a number

5 of adjustments to Ms. Murray's minimum 507(b)

6 calculation, correct?

7 A. Yes.

8 Q. Okay. So you include \$395 million

9 of L/Cs, right?

10 A. That's right.

11 Q. And you exclude cash, pharmacy

12 scripts and pharmacy receivables from the 2L

13 collateral package, right?

14 A. Yes.

15 Q. Would you agree with me that the --

16 your addition of the L/Cs and your exclusion of

17 those collateral items is an approximately

18 \$600 million swing?

19 A. Yes, that's about right.

20 Q. What qualifies you to provide

21 testimony on valuation?

22 MR. GENENDER: Objection, form,

23 misstates the evidence.

24 A. Could you say that again?

25 Q. Yeah. What qualifies you to provide

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1 GRIFFITH  
2 testimony on valuation?  
3 MR. GENENDER: Same objections.  
4 A. I'm a fact witness and I'm here  
5 based on my understanding of the case with my  
6 three years of involvement.  
7 Q. And do you believe you are qualified  
8 to provide testimony on valuation?  
9 MR. GENENDER: Objection, form,  
10 misstates the testimony.  
11 A. I'm a fact witness, and I'm basing  
12 my adjustments and my conclusions based on the  
13 information I have and collective work with the  
14 team and counsel.  
15 Q. Okay. Let's go to paragraph 18 of  
16 your supplemental declaration. And this is the  
17 section of your report where you are discussing  
18 506(c) surcharges.  
19 Do you see that?  
20 A. I do.  
21 Q. If we look a few sentences in, in  
22 paragraph 18, at the top of page 11, do you see  
23 you said if an NOLV approach is used, however,  
24 certain reductions to the 506(c) surcharges  
25 would need to be made, and I paraphrased.

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1 GRIFFITH  
2 Do you see that?  
3 A. Yes.  
4 Q. What amount of reductions to the  
5 506(c) surcharges would need to be made if an  
6 NOLV evaluation approach is used?  
7 A. Would take out the store level  
8 expenses and any corporate overhead allocations  
9 that may have been included in an NOLV  
10 approach.  
11 Q. Have you done any analysis of what  
12 those store level expenses and corporate  
13 overhead allocations amount to?  
14 A. No. We've been focused on the fair  
15 market value approach.  
16 Q. Okay. Let's look earlier in  
17 paragraph 18.  
18 Do you see in the first sentence you  
19 say, "The debtors incurred approximately  
20 1.4 billion in admin expenses in their efforts  
21 to preserve the value of the second  
22 lienholders' collateral"?  
23 A. Yes.  
24 Q. And do you see you say, two  
25 sentences later, "That calculation reflects the

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1 GRIFFITH  
2 debtors' rigorous sale process and efforts to  
3 sell the company as a going concern"?  
4 A. Yes.  
5 Q. The 2L collateral is inventory and  
6 receivables, correct?  
7 A. It is.  
8 Q. Could the company have sold the 2L  
9 collateral without engaging in a going concern  
10 sale?  
11 MR. GENENDER: Objection, form.  
12 A. It's possible.  
13 Q. What else was sold in the going  
14 concern sale to ESL beyond the 2L collateral?  
15 A. The majority of the remaining  
16 assets.  
17 Q. And that included real estate?  
18 A. It did.  
19 Q. Intellectual property?  
20 A. Yes.  
21 Q. And the warranty services business?  
22 A. Yes.  
23 Q. So when you say here in paragraph 18  
24 that the debtors incurred 1.451 billion in  
25 expenses to preserve the 2L collateral, what

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1 GRIFFITH  
2 you really mean is that the debtors incurred  
3 1.451 billion in expenses to conduct the going  
4 concern sale process, correct?  
5 MR. GENENDER: Objection, form,  
6 misstates the evidence.  
7 A. It's a portion of the amount that  
8 was incurred, yes.  
9 Q. What's a portion?  
10 A. The 1.451 billion.  
11 Q. The 1.451 billion is a portion of  
12 the amount that was incurred to conduct the  
13 going concern process?  
14 A. Over the course of the bankruptcy  
15 till closing. That's not the entire amount.  
16 Q. Then if we look at paragraph 20, do  
17 you see you said, "In particular, all  
18 expenditures made by the debtors after the  
19 decision was made to pursue a going concern  
20 sale were made to preserve the value of the  
21 collateral eventually sold to ESL pursuant to  
22 the APA."  
23 Do you see that?  
24 A. I do.  
25 Q. As we just discussed, ESL purchased

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1 GRIFFITH  
2 assets under the APA beyond the 2L collateral,  
3 correct?  
4 A. Yes.  
5 Q. All right. Then if we go to page 6  
6 of your supplemental declaration, do you see in  
7 the chart there that you value the assets that  
8 comprise the 2L collateral as of the petition  
9 date at 2.334 billion?  
10 A. Yes.  
11 Q. And you're taking the position that  
12 the debtor should be permitted to surcharge  
13 that collateral with expenses totaling  
14 1.451 billion, correct?  
15 MR. GENENDER: Objection, form,  
16 misstates the evidence.  
17 A. Yeah, I think it's a different  
18 concept.  
19 Q. How would you describe the concept?  
20 A. Those were the expenses incurred to  
21 get us to a going concern sale that realized  
22 value to the 2Ls from where we believe, if we  
23 went to a straight liquidation, would have been  
24 a zero. So the expenses that were incurred got  
25 us to a point where we could actually increase

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1 GRIFFITH  
2 the value so there would be some recovery to  
3 the 2Ls.  
4 Q. But you believe a surcharge of  
5 1.451 billion should be applied to whatever the  
6 diminution in value of the 2L collateral is,  
7 correct?  
8 A. They were the necessary and  
9 reasonable expenses that were incurred to get  
10 us to the point of the sale.  
11 MO MR. LIUBICIC: Move to strike.  
12 Q. My question was, you believe a  
13 surcharge of 1.451 billion should be applied to  
14 whatever the diminution in value of the 2L  
15 collateral is, correct?  
16 A. Yes.  
17 Q. Do you believe it would be  
18 reasonable for a debtor to spend nearly  
19 \$1.5 billion to preserve collateral consisting  
20 of inventory and receivables having a value of  
21 about 2.3 billion?  
22 MR. GENENDER: Objection, misstates  
23 the evidence.  
24 A. Again, I don't think we can look at  
25 it that way.

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1 GRIFFITH  
2 Q. But do you believe -- if the court  
3 looks at it that way, do you believe that would  
4 be reasonable?  
5 MR. GENENDER: Objection, misstates  
6 the record.  
7 A. I will defer to the court on what's  
8 reasonable.  
9 Q. Okay. You are not offering a view?  
10 A. I'm a fact witness, and this is what  
11 I have put forward.  
12 MR. LIUBICIC: I will pass the  
13 witness.  
14 EXAMINATION BY  
15 MR. FOX:  
16 Q. Mr. Griffith, take a look at -- my  
17 name is Edward Fox. I'm with Seyfarth Shaw,  
18 and I represent Wilmington Trust National  
19 Association as indenture trustee and collateral  
20 agent.  
21 I'm going to stay over here. If you  
22 can't hear me, tell me and I will speak up  
23 and -- you'll tell me. I think it's quicker if  
24 I stay here.  
25 Turn to Exhibit 5, which is your

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1 GRIFFITH  
2 supplemental declaration.  
3 A. Okay.  
4 Q. And can you turn to Exhibit A of  
5 that declaration starting at page 1 of 35?  
6 A. Okay.  
7 Q. It lists here at the top of page 1  
8 of 35, inventory per stock ledger of  
9 2,576,000,000; is that correct?  
10 A. That's what it says, yes.  
11 Q. Is that correct?  
12 A. It's what their statement says.  
13 Q. Do you believe it's correct?  
14 A. I don't have a reason not to.  
15 Q. Do you have a reason to believe it's  
16 correct?  
17 A. It was part of the borrowing base  
18 certificate, so I would assume it's correct.  
19 Q. Okay. Now, in the next line there's  
20 a line that says, "Home services."  
21 Do you know what that's referring  
22 to?  
23 A. Yes.  
24 Q. What is that?  
25 A. Parts inventory associated with the



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1 GRIFFITH  
2 service technicians going to the houses.  
3 Q. And is home services a separate  
4 entity?  
5 A. There's multiple entities. I don't  
6 know exactly where that sits.  
7 Q. Okay. Now, across from home  
8 services, under the Sears column, it lists  
9 \$114.6 million.  
10 Do you see that?  
11 A. I do.  
12 Q. Okay. Is that inventory that's at  
13 home services?  
14 A. That's what it appear to be, yes.  
15 Q. Do you know for sure?  
16 A. That's my understanding.  
17 Q. Okay.  
18 MR. GENENDER: He asked if you knew  
19 for sure.  
20 A. I don't know it for sure. It's my  
21 understanding.  
22 Q. And that 114 million of inventory is  
23 in addition to the 2.576 billion. Is that your  
24 understanding?  
25 A. That's my understanding, yes.

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1 GRIFFITH  
2 \$2.686 billion, correct?  
3 A. Yes, that's what it appears to say.  
4 Q. And do you know where this number  
5 comes from?  
6 A. I don't know.  
7 Q. Do you know why the stock ledger  
8 inventory on page 1 of 35, the 2.576 billion,  
9 is lower than this number?  
10 A. I don't.  
11 Q. Now, there are, under that,  
12 deductions for accounting adjustment stock  
13 ledger inventory of 4,018,000.  
14 Do you see that?  
15 A. I see the adjustments.  
16 Q. There's an adjustment for other for  
17 397,000.  
18 Do you see that?  
19 A. Yes.  
20 Q. Okay. There's an addition for net  
21 layaway of 1.869 million.  
22 Do you see that?  
23 A. Yes.  
24 Q. Okay. And there's a deduction for  
25 trailer reserve/L/C adjustment of 1,238,000.

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1 GRIFFITH  
2 Q. Okay. So when you add those two  
3 together, you get the total stock ledger  
4 inventory of 2.690 billion.  
5 Is that your understanding?  
6 A. Yes.  
7 Q. Okay. Thank you.  
8 Would you turn to the same Exhibit  
9 5, Exhibit A, page 5 of 35?  
10 Do you have that page in front of  
11 you?  
12 A. I do.  
13 Q. Okay. And this is still part of the  
14 borrowing base certificate as of October 13,  
15 2018?  
16 A. Yes.  
17 Q. Okay. Now, in the top box on the  
18 left, where it says in red, "Input from stock  
19 ledger reports," do you see that?  
20 A. Say that part again. Which part?  
21 Q. The top left. It says, "Input from  
22 stock ledger reports."  
23 A. Yes, I see it.  
24 Q. Now, under that it says, "Domestic  
25 total stock ledger inventory," and it says

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1 GRIFFITH  
2 Do you see that?  
3 A. I see it.  
4 Q. Do you know what that trailer  
5 reserve/L/C adjustment, what that means?  
6 A. I can't say that I do.  
7 Q. Okay. Now, if you add or subtract  
8 these numbers we just referred to from the  
9 2,000,686,000, do you get total stock ledger  
10 inventory of 2,690,810,504?  
11 A. I'd need a calculator, but if I look  
12 at it, I believe the signs are working in  
13 reverse. So the negatives, you would actually  
14 add, the positive you would subtract. I  
15 believe you would get to the 2.690, but I'm  
16 just estimating based on this. I don't have a  
17 calculator.  
18 Q. Okay. Now, it then -- after that,  
19 moving down the column, there's then the home  
20 services of 114,592,000 we talked about.  
21 Do you see that?  
22 A. I see that.  
23 Q. And then there's another item,  
24 restaurant, for 339,000.  
25 Do you see that?

<p style="text-align: right;">Page 241</p> <p>1 GRIFFITH</p> <p>2 A. I see it.</p> <p>3 Q. Okay. And then there's in-transit</p> <p>4 inventory aggregating 169 million.</p> <p>5 Do you see that?</p> <p>6 A. Okay.</p> <p>7 Q. Now, do those items get added to the</p> <p>8 2.690 billion of total stock ledger inventory?</p> <p>9 Are those in addition to that amount?</p> <p>10 MR. GENENDER: Objection, lack of</p> <p>11 foundation.</p> <p>12 A. I don't know the answer to that. I</p> <p>13 don't know.</p> <p>14 Q. Then underneath that box there is</p> <p>15 another one that's with the heading "Input from</p> <p>16 EIS."</p> <p>17 A. Okay.</p> <p>18 Q. And then there's -- it lists live</p> <p>19 plants of 1,201,000.</p> <p>20 Do you see that?</p> <p>21 A. I do.</p> <p>22 Q. And decorative flowers of 61,838?</p> <p>23 A. Okay.</p> <p>24 Q. And reader's market of 1,584,461.</p> <p>25 Do you see those items?</p>	<p style="text-align: right;">Page 242</p> <p>1 GRIFFITH</p> <p>2 A. I do.</p> <p>3 Q. Are those additional inventory</p> <p>4 that's not included in the stock ledger</p> <p>5 inventory in the box above, do you know?</p> <p>6 MR. GENENDER: Objection, lack of</p> <p>7 foundation.</p> <p>8 A. I do not know.</p> <p>9 Q. Is there any reason, in particular,</p> <p>10 why you use the inventory number on page 1 of</p> <p>11 35 rather than the inventory numbers on page 5</p> <p>12 of 35 when you prepared your supplemental</p> <p>13 declaration?</p> <p>14 MR. GENENDER: Objection, misstates</p> <p>15 the evidence.</p> <p>16 A. I believe I used the numbers from</p> <p>17 page 3, which are similar or the same as those</p> <p>18 from page 1, but this is the summary borrowing</p> <p>19 base certificate that includes the various --</p> <p>20 all the various pieces of collateral for the</p> <p>21 first lien.</p> <p>22 Q. Well, so let me ask it again.</p> <p>23 Is there a reason why you used the</p> <p>24 inventory numbers from page 3 of 35 rather than</p> <p>25 from page 5 of 35?</p>
<p style="text-align: right;">Page 243</p> <p>1 GRIFFITH</p> <p>2 MR. GENENDER: Objection, form.</p> <p>3 A. Page 5 appears to be a worksheet</p> <p>4 that is used to calculate the numbers that are</p> <p>5 actually in the borrowing base certificate. So</p> <p>6 I'm using the borrowing base.</p> <p>7 Q. Do you know -- do you think page 5</p> <p>8 of 35 has the same information as page 3 of</p> <p>9 35 --</p> <p>10 MR. GENENDER: Objection, misstates</p> <p>11 the testimony.</p> <p>12 Q. -- in terms of inventory?</p> <p>13 A. I can't say for certain that every</p> <p>14 number on each page is the same, but they do</p> <p>15 have the deductions that you just went through</p> <p>16 in terms of live plants, seafood, restaurant,</p> <p>17 readers.</p> <p>18 I can't tell you exactly how page 5</p> <p>19 feeds in, but it does appear that they have a</p> <p>20 lot of the same categories. Page 5 looks like</p> <p>21 a worksheet.</p> <p>22 Q. In paragraph 6 of Exhibit 5, you</p> <p>23 state that, "Second lienholders recovered</p> <p>24 significantly more from the debtors' chapter 11</p> <p>25 process, including from the successful going</p>	<p style="text-align: right;">Page 244</p> <p>1 GRIFFITH</p> <p>2 concern sale and the attendant expenses</p> <p>3 required to secure the same than they would</p> <p>4 have recovered in a liquidation."</p> <p>5 Do you see that?</p> <p>6 A. What paragraph?</p> <p>7 Q. Paragraph 6.</p> <p>8 A. I see that.</p> <p>9 Q. Can you tell me why a comparison to</p> <p>10 a recovery in a liquidation was relevant to</p> <p>11 this motion?</p> <p>12 A. Could you restate the question?</p> <p>13 Q. Yeah. Can you tell me why a</p> <p>14 comparison of the recovery second lienholders</p> <p>15 would receive in liquidation is relevant to the</p> <p>16 507(b) motion?</p> <p>17 A. Our analysis is based on the fair</p> <p>18 market value at the ultimate sale date. This</p> <p>19 was just to show the other alternative would</p> <p>20 have been immediate liquidation, and we believe</p> <p>21 there would have been much lower recoveries, if</p> <p>22 any, in that scenario.</p> <p>23 Q. At the sale date or at the petition</p> <p>24 date?</p> <p>25 A. Petition date.</p>

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1 GRIFFITH  
2 Q. Why would the -- why are you saying  
3 at the petition date?  
4 MR. GENENDER: Objection, form.  
5 A. If we're saying that the liquidation  
6 here is as of the sale date, we would come to  
7 the same conclusion, that the second liens did  
8 better in a going concern transaction.  
9 Q. Okay. You say further down in  
10 paragraph 6 of Exhibit 5 that -- you say,  
11 "First, each of the reports rely on incorrect  
12 or misapplied data taken from other sources."  
13 Do you see that?  
14 A. I do.  
15 Q. Okay. With respect to the report by  
16 William Henrich, does this statement apply to  
17 that report?  
18 A. I believe it does. We say it was  
19 for each. And there were some miscalculations  
20 and data, I think, that we disagreed with?  
21 Q. Can you tell me what incorrect or  
22 misapplied data Henrich relied on?  
23 A. I need a copy of the report.  
24 Q. Which report?  
25 A. Henrich report.

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1 GRIFFITH  
2 that survive the contract or survive the sale  
3 and were assumed by Transform Co.  
4 I would assume he's also potentially  
5 taking the wrong collateral, but I would need  
6 to look at the report.  
7 I don't have it in front of me.  
8 Q. Anything else that you can think of?  
9 A. I would have to look at the report.  
10 MR. GENENDER: Objection to form.  
11 Q. When you say wrong collateral, what  
12 do you mean?  
13 A. Pharmacy scripts, pharmacy accounts  
14 receivable, cash deposits, cash accounts.  
15 Q. With respect to the letters of  
16 credit, there are two separate letter of credit  
17 facilities. One was in the amount of  
18 271 million. The other was, I believe,  
19 125 million.  
20 Do you recall that?  
21 A. Yes.  
22 Q. And they total 395 million?  
23 A. Yes.  
24 Q. And do you recall that Henrich  
25 excluded the \$271 million facility and not the

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1 GRIFFITH  
2 Q. Before we get to that, turn to  
3 paragraph 12 of Exhibit 5.  
4 A. Okay.  
5 Q. And from Exhibit 12 to Exhibit 16.  
6 MR. GENENDER: Paragraph?  
7 Q. You are right. From paragraphs 12  
8 through 16, is that your discussion of how the  
9 reports rely on incorrect or misapplied data?  
10 A. It's a portion of it.  
11 Q. And there's more that's not listed  
12 here?  
13 A. I would have to go back and look at  
14 the report.  
15 Q. What report?  
16 A. The Henrich report.  
17 Q. As you sit here today, can you think  
18 of anything else that's not in your report  
19 specifically that -- where you believe Henrich  
20 relied on incorrect or misapplied data?  
21 A. I would imagine that he has a lot of  
22 the same issues, but we would -- I would need  
23 to look through the report. I would assume  
24 he's not treating the L/Cs as we would treat  
25 them, which we believe are true obligations

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1 GRIFFITH  
2 125 million?  
3 A. He included the 125, which we agreed  
4 with, but we disagree with excluding the 271.  
5 Q. Okay. Of the \$125 million facility,  
6 how much of that had been drawn, if any, at the  
7 petition date, to your knowledge?  
8 A. I can't say for certain, but the  
9 obligations are still there.  
10 Q. Okay. But do you have any sense of  
11 how much may have been drawn at the petition  
12 date?  
13 MR. GENENDER: Objection, asked and  
14 answered.  
15 A. Yeah, not off the top of my head,  
16 no.  
17 (Griffith Exhibit 25, Expert Report  
18 of William Henrich, marked for  
19 identification.)  
20 Q. Let me show you what's been marked  
21 as Exhibit 25.  
22 So Exhibit 25 is the Henrich report.  
23 Have you seen this before?  
24 A. I have.  
25 Q. You said you need to look through it

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1 GRIFFITH  
2 to see if there are other things that you  
3 thought Henrich -- where Henrich relied on  
4 incorrect or misapplied data.  
5 Can you take a look and tell me what  
6 else you find, if anything?  
7 A. (Document review.)  
8 He is using the total cash as  
9 collateral. He is using the pharmacy accounts  
10 receivable as collateral. He is using the  
11 pharmacy prescription list as collateral.  
12 He's excluding the 271 million of  
13 L/Cs that are assumed by the buyer and remain  
14 obligations.  
15 Q. Anything else?  
16 A. The way the inventory is calculated.  
17 Q. When you say the way the inventory  
18 is calculated, what do you mean?  
19 A. He has various approaches for a  
20 going concern, total inventory at cost. None  
21 of it appears to show potential discount either  
22 to the fair market value or as others have done  
23 in NOLV.  
24 Q. With respect to pharmacy  
25 receivables, it's your view, I take it, that

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1 GRIFFITH  
2 those are not second lienholders' collateral;  
3 is that correct?  
4 A. Yes.  
5 Q. What's the basis for your view on  
6 that?  
7 MR. GENENDER: Objection, asked and  
8 answered.  
9 A. We looked at the security agreements  
10 for the first lien and the second lien. First  
11 lien clearly carve out all of the major pieces  
12 of the collateral. The second liens take  
13 certain categories, but not others, and claim  
14 that they are covered by a catch-all at the  
15 bottom, which doesn't make a lot of sense to  
16 us.  
17 They appear to be excluded  
18 collateral.  
19 Q. When you say "we" looked at it, who  
20 is "we"?  
21 A. My team.  
22 Q. Who is your team again?  
23 A. M-III Partners.  
24 Q. It's all people internally at M-III?  
25 A. M-III and counsel.

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1 GRIFFITH  
2 Q. And counsel.  
3 Did you make this decision based on  
4 the advice of counsel?  
5 A. No.  
6 Q. You are not a lawyer, are you?  
7 MR. GENENDER: Objection, asked and  
8 answered.  
9 A. I am not a lawyer.  
10 MR. GENENDER: He has not gotten a  
11 law degree over the course of the day.  
12 Q. Anybody on your M-III team a lawyer?  
13 A. Members of the firm are lawyers, but  
14 not on the team that was working on this.  
15 MR. GENENDER: Ed, hang on a second.  
16 Mr. Griffith, you said in the 1L  
17 piece that it carved out certain pieces  
18 from the 1L listed inventory.  
19 Did you mean carve out or include?  
20 THE WITNESS: I meant to say broke  
21 out or included. Sorry. Good  
22 clarification.  
23 MR. GENENDER: Thank you for  
24 allowing me. I think in the context, it  
25 was clear he misspoke.

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1 GRIFFITH  
2 Q. Do you believe that pharmacy  
3 inventory is part of inventory that is second  
4 lien collateral?  
5 A. I don't have a view on that. I  
6 would assume, if it's in the inventory, it was  
7 not specifically called out in the first lien.  
8 We're treating it the same way.  
9 Q. And that's your opinion?  
10 A. Yes.  
11 Q. You say, "Second, each of the,"  
12 again, in paragraph 6 of Exhibit 5 that, "Each  
13 of the reports uses a different and incorrect  
14 methodology to calculate the value of the  
15 debtors' inventory."  
16 With respect to the Henrich report,  
17 do you believe that Henrich uses an incorrect  
18 methodology to calculate the value of the  
19 debtors' inventory?  
20 A. (Document review.)  
21 Which inventory valuation was he  
22 using, inventory at cost or going concern?  
23 Q. You have his report in front of you,  
24 right?  
25 A. I do.

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1 GRIFFITH  
2 Q. So if you're saying that he used an  
3 incorrect methodology, I'm just asking you to  
4 explain it with reference to his report.  
5 A. He's using a grossed-up value of  
6 inventory, which we disagree with, for the  
7 going concern stores.  
8 Q. And the grossed-up value you are  
9 referring to, his use of gross margin of  
10 29 percent?  
11 A. He is doing a calculation, yes,  
12 that's showing the value as higher than the  
13 book value.  
14 Q. Is the margin, the gross margin that  
15 he uses 29 percent?  
16 A. If you can point me to it, I can  
17 tell you.  
18 Q. Where are you referring to that he  
19 uses a margin that's incorrect?  
20 A. Exhibit 2A, he's grossing up his  
21 inventory value.  
22 Q. Take a look at -- sorry, there's no  
23 page numbers.  
24 MR. GENENDER: We established that  
25 during his deposition.

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1 GRIFFITH  
2 collateral or, conversely, if you use a Tiger  
3 NOLV, it's also significantly less than  
4 90 percent, somewhere in the 80s. So I don't  
5 know why we would gross up the inventory value.  
6 Q. What's the date of the Asset  
7 Purchase Agreement?  
8 A. I'd have to have a copy of it.  
9 Q. It's in front of you.  
10 MR. GENENDER: The date of the APA  
11 or the date of the sale?  
12 Q. Let's start with the date of the  
13 APA. It's Exhibit 14. It's dated as of  
14 January 17, 2019.  
15 A. Okay.  
16 Q. Do you accept my representation on  
17 that?  
18 A. I do.  
19 Q. And the sale closed on February 11,  
20 2019?  
21 A. It sounds right, yes.  
22 Q. The petition date was October 15,  
23 2018; is that right?  
24 A. Yes.  
25 Q. And aside from the

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1 GRIFFITH  
2 MR. FOX: It hasn't changed.  
3 Q. The fourth text page, do you have  
4 that page?  
5 A. I do.  
6 Q. The second bullet point from the  
7 bottom, in the second line, refers to a  
8 29 percent gross margin?  
9 A. Okay.  
10 Q. Do you disagree with the 29 percent  
11 gross margin?  
12 A. I don't have a basis to confirm it  
13 or deny it.  
14 Q. Well, but you're saying that he used  
15 an incorrect methodology, so.  
16 A. I don't believe he should be  
17 grossing anything up. I think it's the  
18 liquidation value or the fair market value is  
19 the two more common approaches.  
20 I don't understand why he's taking  
21 this approach.  
22 Q. What's the basis for your belief?  
23 A. From the APA, we understand it to be  
24 85 percent purchase price, which is kind of the  
25 going fair market value of that inventory and

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1 GRIFFITH  
2 going-out-of-business stores, from October 15,  
3 2018, through February 11, 2019, what did the  
4 debtors do with their going concern stores?  
5 MR. GENENDER: Objection, form.  
6 A. Could you restate the question?  
7 Q. Yeah. Between October 15, 2018, and  
8 the closing of the sale on February 11, 2019,  
9 what were the debtors doing at their going  
10 concern stores? Were they open for business to  
11 sell at retail?  
12 A. Yes.  
13 Q. And do you have a view as to the  
14 fair market value of the inventory that was  
15 being sold at retail in those stores during  
16 that period of time?  
17 A. Yes.  
18 Q. And what's that view?  
19 A. 85 percent.  
20 Q. What do you base that on?  
21 A. The fair market value when it was  
22 purchased.  
23 Q. In February of 2019?  
24 A. Yes. That's the proxy that I'm  
25 using.

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1 GRIFFITH

2 Q. By ESL or Transform Holdco in a bulk

3 sale?

4 A. Yes.

5 Q. And you think that's the same as

6 selling at retail to customers in stores on

7 October 15, 2018? Is that your testimony?

8 MR. GENENDER: Objection, misstates

9 the testimony.

10 A. Sears operates at a loss. So to

11 mark up the inventory and say that there is a

12 increase in the value associated with the sale

13 just doesn't make sense to me.

14 MO MR. FOX: Well, that's fine, but I'm

15 going to move to strike that because you

16 didn't answer my question.

17 Q. Would you like me to ask the

18 reporter to read the question back?

19 A. Please.

20 MR. FOX: Would you read the

21 question back, please?

22 (Record read.)

23 MR. GENENDER: Same objection.

24 A. I don't think I understand the

25 question.

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1 GRIFFITH

2 required under the final debtor-in-possession

3 financing order?

4 A. Yes.

5 Q. Did you have any involvement in

6 preparing any of those reports?

7 A. I believe I did.

8 Q. Did those reports include a forecast

9 of the future as well as actual results from

10 the past?

11 A. I'd have to see a copy of one of

12 these.

13 (Griffith Exhibit 26, Rolling

14 13-Week Cash Flow Forecast for Week Six,

15 marked for identification.)

16 Q. Let me show you what's been marked

17 as Exhibit 26. Do you have Exhibit 26 in front

18 of you?

19 A. I do.

20 Q. Do you know what Exhibit 26 is?

21 A. I do.

22 Q. What is it?

23 A. It's a rolling 13-week cash flow

24 forecast for week six.

25 Q. And week six is the week ending

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1 GRIFFITH

2 Q. What don't you understand?

3 A. I need you to try to restate it.

4 Q. Do you know the difference between

5 selling in stores to retail customers and

6 selling an entire business in bulk to a buyer?

7 Do you think there's a difference

8 between those two things?

9 A. A very large difference.

10 Q. Okay. And do you think the fact

11 that there's a very large difference between

12 those things might affect the valuations of the

13 things that are being sold in those two

14 different situations?

15 A. I'm still -- I don't understand the

16 question. You're saying just take the gross

17 margin and that's --

18 Q. No. I'm just asking you if there's

19 a difference between those two sales methods,

20 one at retail --

21 A. I answered that as yes.

22 Q. You think there is a difference?

23 A. Yes.

24 Q. Okay. Are you aware that the

25 debtors prepared weekly financial reports as

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1 GRIFFITH

2 November 24, 2018; is that right?

3 A. (Document review.)

4 It appears that way, yes.

5 Q. Okay. And this, on the first page

6 of Exhibit 26 at the bottom left, it says M-III

7 Partners, correct?

8 A. It does.

9 Q. And that's your firm?

10 A. It is.

11 Q. Is that an indication that M-III

12 Partners had something to do with preparing

13 Exhibit 26?

14 A. It does.

15 Q. Can you tell me what M-III Partners

16 had to do with preparing Exhibit 26?

17 A. We would update the future period

18 forecasts. We would grab the actual data when

19 the weeks were completed, put it into the

20 format and update the assumptions and

21 commentary.

22 Q. Turn to page 4 of Exhibit 26, if you

23 will.

24 And looking at the top of the

25 headings of Exhibit 26 on page 4, it shows both



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1 GRIFFITH  
2 actual results and forecast results for the  
3 time periods indicated; is that correct?  
4 A. It does.  
5 Q. Okay. And for the forecast periods,  
6 the second line under key assumptions on the  
7 left-hand side says, "Forecast gross margin."  
8 Do you see that?  
9 A. I see that.  
10 Q. And looking across, for each of the  
11 forecast weeks, what is the forecast gross  
12 margin that M-III used for the forecast gross  
13 margin?  
14 A. It says 29 percent.  
15 Q. Thank you.  
16 Now, given that M-III used  
17 29 percent as a forecast gross margin, do you  
18 still believe that Henrich was wrong in using  
19 29 percent as a gross margin in his report?  
20 MR. GENENDER: Objection, misstates  
21 the evidence.  
22 A. I don't think it's the correct way  
23 to do it. It's not a question of what margin  
24 you are using. It's the methodology.  
25 Q. Well, the question is, do you

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1 GRIFFITH  
2 believe Henrich was wrong to use a 29 percent  
3 gross margin, which is the same gross margin  
4 that M-III used?  
5 MR. GENENDER: Objection, misstates  
6 the evidence.  
7 A. I said I disagree with his  
8 methodology. I don't have a problem with the  
9 29 percent margin.  
10 Q. Okay. That's all I'm asking about.  
11 Now -- bear with me. I want to make  
12 sure I don't ask questions that have already  
13 been asked.  
14 Okay. Turn to -- take a look at  
15 Exhibit 4, which is your May 26, 2019  
16 declaration, if you would.  
17 A. Okay.  
18 Q. Turn to paragraph 14 of Exhibit 4.  
19 A. Amount of cash.  
20 Q. And it says in paragraph 14, "As  
21 shown in the debtors' valuation, M-III valued  
22 the collateral at 85 percent."  
23 Do you see that?  
24 A. I do.  
25 Q. Okay. When you say M-III valued,

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1 GRIFFITH  
2 who at M-III?  
3 A. It's the assumption we were using.  
4 So it would be myself and the team that was  
5 working with me.  
6 Q. You say that's the assumption you  
7 were using. Is that your opinion?  
8 A. It's the assumption we were using,  
9 was the 85 percent.  
10 Q. So it's not your opinion?  
11 MR. GENENDER: Objection to form,  
12 asked and answered.  
13 A. It's one of the assumptions we have  
14 used in this document, yes. So it's my  
15 declaration. So if you want to call it my  
16 opinion, but it's the 85 percent.  
17 Q. It's not what I want to call it.  
18 It's what you are calling it.  
19 A. I'm calling it an assumption.  
20 Q. Not an opinion?  
21 MR. GENENDER: Objection, form.  
22 A. I -- honestly, I would like to know  
23 the difference.  
24 Q. You don't know the difference?  
25 MR. GENENDER: Objection, form.

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1 GRIFFITH  
2 Q. Well, will you agree with me that  
3 the 85 percent value is not a fact?  
4 MR. GENENDER: Objection, form,  
5 misstates the evidence.  
6 A. I believe it is a fact. It's the  
7 cash value that was paid under the APA.  
8 Q. But you say, at both the petition  
9 date and the effective date, the only time that  
10 you claim the 85 percent was paid was at the  
11 effective date or the sale date, right?  
12 A. Yes.  
13 Q. So there's no 85 percent paid at the  
14 petition date, correct?  
15 A. It's a way to show this on a  
16 consistent basis.  
17 MO MR. FOX: I'm going to move to  
18 strike.  
19 Q. You're not answering my question.  
20 MR. GENENDER: Hang on a second.  
21 You can object to his answer as  
22 non-responsive, but you can't prevent him  
23 from answering the question, which you  
24 just did. That's not okay.  
25 You may not be getting the answer

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1 GRIFFITH  
2 you want, but he's entitled to give an  
3 answer.  
4 MR. FOX: He is supposed to answer  
5 the question I ask, not the question he  
6 wants to.  
7 MR. GENENDER: But if he doesn't,  
8 then you can move to strike, but you can't  
9 stop him from answering. That's improper.  
10 MR. FOX: You want to finish your  
11 answer?  
12 MR. GENENDER: No. Ask a question  
13 again, because you cut him off.  
14 MR. FOX: Can you read the question  
15 back?  
16 (Record read.)  
17 A. There is no 85 percent paid at the  
18 petition date.  
19 Q. Thank you.  
20 Looking at paragraph 8 of Exhibit 5.  
21 Do you have that?  
22 A. I do.  
23 Q. You say, "The implied value of  
24 85 percent, as applied to the gross book value  
25 of the second lienholders' collateral, far

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1 GRIFFITH  
2 exceeds the value that would have otherwise  
3 been obtained in either a wind-down or a  
4 liquidation scenario."  
5 Is that right?  
6 A. Yes.  
7 Q. Can you tell me, if you know, what  
8 the recovery at going-out-of-business stores  
9 was as a percentage of book value of inventory?  
10 A. Before or after corporate  
11 allocations?  
12 Q. Isn't your going out of business a  
13 percentage valuation on a net basis?  
14 A. Not necessarily.  
15 Q. Let's -- without your corporate  
16 overhead allocation.  
17 A. What's the question?  
18 Q. The question is, what was the  
19 recovery as a percentage of book value on  
20 inventory at going-out-of-business stores?  
21 A. Without any allocations, I can't  
22 tell you.  
23 Q. You have no idea?  
24 A. There are certain allocations that  
25 are made that are sometimes used in certain

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1 GRIFFITH  
2 reports, internally developed ones by the Sears  
3 team and Tiger takes a certain view as well,  
4 but they're not based in actual total overhead.  
5 Q. I'm asking what the debtors' actual  
6 experience was, not about Tiger's estimates.  
7 Do you know what the debtors' actual  
8 experience was?  
9 A. It would depend how much corporate  
10 allocations you were putting on the stores.  
11 Q. If you allocated no corporate  
12 overhead, what would the result be?  
13 A. I can't answer that. I don't know.  
14 Q. You don't know.  
15 How much overhead do you believe  
16 should be allocated to the  
17 going-out-of-business store sales?  
18 MR. GENENDER: Objection,  
19 foundation.  
20 A. It's hard to say.  
21 Q. So you don't know how much corporate  
22 overhead should be allocated to the  
23 going-out-of-business sale stores' results?  
24 A. It would depend on the situation.  
25 Q. Well, we are talking about the

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1 GRIFFITH  
2 debtors' situation, the 242  
3 going-out-of-business stores.  
4 MR. GENENDER: 262.  
5 MR. FOX: 262. Thank you.  
6 A. There should be more allocations  
7 than what they currently have in the model.  
8 Q. How much?  
9 MR. GENENDER: He is still talking.  
10 A. I don't have that quantified.  
11 Q. Did you ever quantify it?  
12 A. We have done full-scale wind-down  
13 analysis, which would -- is the only version we  
14 have done. We have not done a fully burdened  
15 262-store number. It just hasn't been  
16 something we focused on.  
17 Q. You said you did do wind-down  
18 analyses, correct?  
19 A. We have.  
20 Q. Okay. And do you recall what the  
21 percentage recovery on going-out-of-business  
22 sales was estimated at in those analyses?  
23 A. I can't -- I mean, it would depend,  
24 again, on how the corporate allocations are  
25 done.

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1 GRIFFITH

2 Q. Well, I'm talking about analyses

3 that the debtors or M-III actually did.

4 A. I don't have one of those in front

5 of me.

6 (Griffith Exhibit 27, Wind Down

7 Recoveries, Dated January 12, 2019, marked

8 for identification.)

9 Q. I show you what's been marked as

10 Exhibit 27.

11 Do you have that in front of you,

12 Mr. Griffith?

13 A. I have that, yes.

14 Q. Look at page 2 of Exhibit 27, if you

15 would.

16 Do you have that page?

17 A. I do.

18 Q. Under the fourth indented bullet

19 point from the bottom of the page that starts

20 "The gross proceeds from GOB sales of

21 merchandise inventory."

22 A. Okay.

23 Q. It says, "As this inventory is sold,

24 expenses related to the inventory liquidation

25 are deducted from proceeds, resulting in an

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1 GRIFFITH

2 A. I do.

3 Q. Do you know what Exhibit 28 is?

4 A. It's a rolling cash flow budget for

5 week 15.

6 Q. And that's dated January 30, 2019?

7 A. It is.

8 Q. Do you know who prepared this?

9 A. I believe it's the M-III team.

10 Q. Take a look at page 3 of Exhibit 28

11 if you would.

12 A. Okay.

13 Q. Do you see a series of sort of

14 numbered notes, if you would, down the

15 left-hand side of the page?

16 A. I do.

17 Q. Look at number two, please. It

18 says, "GOB sales receipts."

19 Do you see that?

20 A. I do.

21 Q. The last sentence in that section

22 says, "Total NOLV for the wave three closing

23 stores is assumed at approximately 92 percent

24 on a preliminary basis."

25 Do you see that?

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1 GRIFFITH

2 assumed net orderly liquidation inventory value

3 to the estate of approximately 90 percent."

4 Do you see that?

5 A. I don't believe that's fully

6 burdened, though, with overhead.

7 Q. Do you see that on the printed page

8 of Exhibit 27?

9 A. I see that.

10 Q. Okay. Do you know who prepared

11 Exhibit 27?

12 A. I don't know.

13 Q. Was it M-III?

14 A. It may have been a member of the

15 M-III team, possibly, yes.

16 Q. And this is a document that the

17 debtors produced; is that correct?

18 A. I believe that's correct.

19 (Griffith Exhibit 28, Rolling Cash

20 Flow Budget for Week 15, marked for

21 identification.)

22 Q. Let me show you what's been marked

23 as Exhibit 28.

24 Do you have that in front of you,

25 Mr. Griffith?

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1 GRIFFITH

2 MR. GENENDER: Objection, form.

3 Q. I'm sorry?

4 A. Yes.

5 Q. And was that M-III assumption with

6 respect to the wave three; GOB stores?

7 MR. GENENDER: Objection, form.

8 A. I don't believe it was our

9 assumption.

10 Q. It's the debtors' assumption?

11 MR. GENENDER: Objection, form.

12 A. I'm not sure, but it doesn't have

13 all of our corporate allocations that would be

14 required.

15 Q. How do you know that?

16 MR. GENENDER: You only read part of

17 the phrase.

18 MR. FOX: Maybe he can answer.

19 MR. GENENDER: You also only read

20 part of the phrase.

21 A. (Document review.)

22 92 percent, that doesn't sound

23 correct. I think that the overhead is still

24 down in the operating disbursements.

25 Q. Can you tell me why M-III would

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1 GRIFFITH

2 assume that a total NOLV for the wave three

3 closing stores would be assumed at

4 approximately 92 percent if that number is

5 incorrect?

6 MR. GENENDER: Objection, misstates

7 his testimony.

8 A. Because in the operating

9 disbursements, we back out the actual GOB rent

10 and the GOB additional expense benefit, but we

11 do not back out, I believe, corporate overhead

12 because it's not part of the store level GOB

13 expenses.

14 Q. Can you show me where that occurs on

15 Exhibit 28?

16 A. It's in the assumptions on page 3.

17 Q. Where?

18 A. Operating disbursements, line 11 and

19 12, GOB rent, GOB additional expenses/benefit.

20 Q. Turn to page 4, if you would, and

21 look at line 11 for GOB rent.

22 Do you see that?

23 A. I see that.

24 Q. What's the total number?

25 A. It says 22.

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1 GRIFFITH

2 say that, "The margins in a fire sale would be

3 lower, as among other things, inventory floods

4 the market."

5 What do you mean by inventory

6 flooding the market?

7 A. We are running fast sales across all

8 of the remaining stores. So there will be

9 plenty of inventory available, which you will

10 have to discount faster, at a faster cadence in

11 order to move it through the stores.

12 Q. Is that your opinion or is that a

13 fact?

14 A. It's my assumption that that's what

15 we would have to do.

16 Q. And how many stores are you talking

17 about here?

18 A. At what period?

19 Q. Whatever period you're talking about

20 here with inventory flooding the market.

21 A. If you assume it's the petition

22 date, it's over 600 stores.

23 Q. And those are geographically

24 dispersed throughout the United States; is that

25 right?

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1 GRIFFITH

2 Q. No, no, the actual number.

3 A. I don't know what you are referring

4 to.

5 Q. Well, there's both the actual and

6 forecast amounts, correct?

7 MR. GENENDER: The document speaks

8 for itself.

9 MR. FOX: Not according to the

10 witness.

11 MO MR. GENENDER: Objection, move to

12 strike. I mean, come on.

13 A. You are asking for what?

14 Q. I'm asking you, what's the actual

15 GOB rent number in line 11?

16 A. It appears to be about 20 million.

17 Q. Is GOB rent a direct expense or a

18 corporate overhead expense?

19 A. It would be a direct expense.

20 Q. And then line 12, GOB additional

21 expense/benefit, what's the amount on that line

22 for the actual number?

23 A. I think it's a zero.

24 Q. Yes. Thank you.

25 In paragraph nine of Exhibit 5 you

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1 GRIFFITH

2 A. There are concentration areas of

3 them, yeah. They are not perfectly dispersed.

4 Q. But they are dispersed throughout

5 the United States, correct?

6 A. They are.

7 Q. And that includes Puerto Rico and

8 places outside the continental United States,

9 correct?

10 A. It does.

11 Q. Okay. And the total was 600 and how

12 many stores at the petition date?

13 A. 600 plus. I don't recall exactly.

14 Q. You also talk about the debtors

15 facing complications with vendor flight.

16 What do you mean by vendor flight?

17 A. GOBs, you still do want to

18 replenish, especially with certain high

19 turning, high margin goods you would not be

20 able to do. So it would potentially impact

21 your overall results.

22 Q. So you're telling me that, even in a

23 fire sale, you are going to be buying new

24 inventory?

25 A. It's possible.

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1 GRIFFITH  
2 Q. Have you ever seen that before?  
3 A. I can't say for certain, no.  
4 Q. You also say in paragraph 9 of  
5 Exhibit 5 that, "The debtors would be unable to  
6 collect on certain receivables."  
7 Do you see that?  
8 A. I see that.  
9 Q. Okay. What receivables are you  
10 referring to?  
11 A. Potentially, credit card  
12 receivables. If the processors continue to  
13 have holdbacks and customers are returning  
14 goods.  
15 Q. Well, in going-out-of-business  
16 sales, aren't customers not permitted to return  
17 goods? Aren't those sales final?  
18 A. You still would have receivables  
19 outstanding prior to that, that may become  
20 difficult to collect.  
21 Q. Credit card receivables?  
22 A. Certain receivables.  
23 Q. Do you mean credit card receivables  
24 or other kinds of receivables?  
25 A. Receivables in general.

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1 GRIFFITH  
2 Q. What kind of receivables would there  
3 be besides credit card receivables?  
4 A. We had a whole list of specified  
5 receivables that were part of the transaction.  
6 They could potentially be at issue.  
7 Q. But you can't, sitting here today,  
8 tell me what those other receivables are?  
9 A. Vendor credits, vendor deposit --  
10 vendor rebates. Those would ultimately,  
11 potentially, not be considered an asset, so.  
12 Q. Do you believe those would be  
13 collateral of the second lien notes?  
14 A. No.  
15 Q. Going back to Exhibit 4, if you  
16 would, paragraph 20 -- actually, let's go to  
17 paragraph 19 of Exhibit 4 first.  
18 You talk about -- you say, "To  
19 calculate the applicable 506(c) surcharges,  
20 M-III included only those charges which were  
21 reasonable and necessary and of direct and  
22 primary benefit to the second lienholders."  
23 Again, who at M-III?  
24 A. Myself and the team that was working  
25 on this.

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1 GRIFFITH  
2 Q. Then you say, "To do so, M-III  
3 included only the actual expenses directly  
4 related to the collateral and paid through the  
5 sale date."  
6 Again, M-III is you; is that right?  
7 A. Yes.  
8 Q. And your team?  
9 A. Yes.  
10 Q. Okay. Now, paragraph 20, you have a  
11 list of what you believe the surcharges should  
12 be; is that correct?  
13 A. Yes.  
14 Q. Okay. And are these facts or your  
15 opinion in paragraph 20?  
16 A. These are actual expenses.  
17 MR. GENENDER: Objection to form.  
18 Go ahead.  
19 A. These are actual expenses that were  
20 incurred.  
21 Q. What did you base your decision on  
22 to decide to list these particular expenses?  
23 A. They appear to directly relate to  
24 store operations and monetization of the  
25 collateral.

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1 GRIFFITH  
2 Q. And how did you derive the amounts  
3 that are set forth here in the chart in  
4 paragraph 20?  
5 A. You use certain portions of the  
6 actual expenses that were incurred from the  
7 petition date to the close date.  
8 Q. And how did you calculate those  
9 certain portions?  
10 A. By using several of the files that  
11 we received from the Sears treasury team, and  
12 would have been the basis for the weekly cash  
13 forecast and actual results.  
14 Q. And these files, are these files  
15 limited to the amounts listed here or are they  
16 covering all of the expenses?  
17 A. They are covering additional  
18 expenses as well.  
19 Q. So did you -- where did you isolate  
20 these particular amounts of expenses that are  
21 listed here?  
22 A. It's an analysis that we did as part  
23 of this to come up with these categories and  
24 these amounts.  
25 Q. Is that analysis in writing?

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1 GRIFFITH  
2 A. I'm sorry?  
3 Q. Is that analysis in writing?  
4 MR. GENENDER: Objection, form.  
5 A. Yeah. This is it. We have the  
6 purpose and the use, the category and the  
7 amounts.  
8 Q. This is the entire written analysis  
9 of the amounts that you assume from the total  
10 should be 506(c) surcharges in paragraph 20 of  
11 Exhibit 4?  
12 A. Yes.  
13 Q. So if our expert wanted to recreate  
14 your analysis, how would they be able to do it?  
15 MR. GENENDER: Objection, form.  
16 A. We provided the data files. We have  
17 to have them take a look at it and see if they  
18 can come up with something similar.  
19 Q. Well, the data files, though, I  
20 think you just said, encompass all of these  
21 expenses, not just the ones that are listed,  
22 not just the amounts that are listed here; is  
23 that correct?  
24 A. Yes, that's right.  
25 Q. So what's the methodology by which

Page 282

1 GRIFFITH  
2 you came to these particular numbers and where  
3 is that determination made?  
4 MR. GENENDER: Objection, compound,  
5 form.  
6 A. This was our basis. This was based  
7 on our assumptions. This is the summary output  
8 of it.  
9 Q. This is your entire output to  
10 calculate these numbers?  
11 MR. GENENDER: Objection, asked and  
12 answered.  
13 A. These are the categories that we  
14 have identified that we believe directly  
15 related to the monetization.  
16 MR. GENENDER: Let's take a break.  
17 We have been going for an hour. Actually,  
18 we have been going for way more than an  
19 hour, unless you are close to being done.  
20 MR. FOX: I'm getting there, but --  
21 MR. GENENDER: What does getting  
22 there mean?  
23 MR. FOX: Probably another half  
24 hour. Maybe less.  
25 (Recess taken at 8:30 p.m. to

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1 GRIFFITH  
2 8:37 p.m.)  
3 MR. FOX: Can you read back the last  
4 question and answer, please?  
5 (Record read.)  
6 BY MR. FOX:  
7 Q. Mr. Griffith, my question was about  
8 the dollar amounts.  
9 So could you answer my question with  
10 respect to the dollar amounts, please, not the  
11 categories?  
12 A. Yeah. These are the dollar amounts  
13 we believe are associated with the  
14 monetization.  
15 Q. And this is -- paragraph 20 of  
16 Exhibit 4 is your entire output concerning that  
17 determination; is that right?  
18 MR. GENENDER: Objection, form asked  
19 and answered.  
20 A. That is the output, yes.  
21 Q. With respect to the 51 million of  
22 professional fees, I believe your testimony was  
23 that you went through the total professional  
24 fees and pulled out task codes or fees relating  
25 to task codes relating to M&A transaction; is

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1 GRIFFITH  
2 that right?  
3 A. I didn't personally do it. But,  
4 yes, that's what was done.  
5 Q. Who did it?  
6 A. Counsel had done this part of it.  
7 Q. Counsel did it.  
8 Do you know which professionals were  
9 included in this 51 million?  
10 A. It was the professionals that had  
11 time codes associated with the sales  
12 transaction, is my understanding.  
13 Q. Did that include Akin Gump?  
14 A. I don't know the answer to that.  
15 Q. Did it include Houlihan Lokey?  
16 A. I don't know the answer to that.  
17 Q. Well, if they had time and the  
18 correct task codes, would they have been  
19 included?  
20 A. I don't know. I don't know the  
21 answer.  
22 Q. So you don't really, sitting here  
23 today, have any idea what makes up this  
24 51 million except to the extent you've  
25 described?



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1 GRIFFITH  
2 A. That's right.  
3 Q. And is there any writing anywhere,  
4 anything in written form that indicates which  
5 line items of the professional fees were  
6 included in this 51 million?  
7 A. I'm sure there's something that  
8 exists.  
9 Q. Has it been produced?  
10 A. I'm not sure.  
11 Q. Are you familiar with something  
12 called the "Professional Fee Carve-out  
13 Account"?  
14 A. I am.  
15 Q. Okay. And can you tell me what your  
16 understanding is of that?  
17 A. It was set up to fund accrued  
18 professional fees of the professionals of the  
19 estate, the restructuring committee and the  
20 UCC.  
21 Q. And where do the funds come from to  
22 fund the professional fee carve-out account as  
23 far as you know?  
24 A. From operations from the wind-down  
25 account, general cash.

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1 GRIFFITH  
2 Q. Well, prior to the closing of the  
3 sale to Transform, where did the funds come  
4 from that were being used to fund the  
5 professional fee carve-out account, if you  
6 know?  
7 A. I don't recall specifically.  
8 Q. Did they come out of the second  
9 lienholders' collateral?  
10 A. I can't say for sure. I don't know.  
11 Q. Do you know whether or not this  
12 51 million of professional fees has been paid  
13 out of the professional fee carve-out account?  
14 MR. GENENDER: Objection,  
15 foundation.  
16 A. To the extent it relates to company  
17 professionals, restructuring committee  
18 professionals or UCC advisors, it would come  
19 out of the carve-out account.  
20 Q. And has the 51 million already been  
21 paid out of the professional fee carve-out?  
22 MR. GENENDER: Objection,  
23 foundation.  
24 Q. If you know.  
25 A. It's unclear. I think we have said

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1 GRIFFITH  
2 that these were the accrued amounts, not  
3 necessarily paid in cash.  
4 Q. Is it safe to say, though, that they  
5 have been reserved for the professional fee  
6 carve-out account?  
7 A. If they relate to professionals from  
8 the company, the restructuring committee or the  
9 UCC, I think that's a fair assumption.  
10 (Griffith Exhibit 29, Project Blue  
11 Actuals from Week Ended January 26 through  
12 February 9, marked for identification.)  
13 Q. Mr. Griffith, let me show you what's  
14 been marked as Exhibit 29.  
15 Take a look first at Exhibit 28  
16 again. That's the Project Blue rolling cash  
17 flow budget, January 30, 2019.  
18 Do you have that in front of you?  
19 A. I do.  
20 Q. And turn to page 4 of Exhibit 28.  
21 A. Okay.  
22 Q. Take a look at the -- page 4. Am I  
23 correct that this shows the 13-week DIP budget  
24 actuals from October 20 to -- the week ending  
25 October 20, 2018, through the week ending

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1 GRIFFITH  
2 January 26, 2019?  
3 A. What was the ending date you said?  
4 Q. Week 15, ending January 26, 2019.  
5 A. Yeah. Yes.  
6 Q. Now, can you tell me, was a rolling  
7 cash flow budget in the form of Exhibit 28  
8 prepared that covered the weeks of --  
9 additionally covered the weeks of February 2,  
10 2019, the week ending February 9, 2019, and the  
11 week ending February 16, 2019, in the same  
12 format as Exhibit 28?  
13 A. I can't say for certain.  
14 Q. Take a look at Exhibit 29.  
15 And have you seen this before? Do  
16 you know what this is?  
17 A. Yes, it looks familiar.  
18 Q. Tell me what it is.  
19 A. It's the actual results for weeks 15  
20 through 17.  
21 Q. That's the weeks ending January 26,  
22 February 2 and February 9, 2019?  
23 A. Yes.  
24 Q. And that picks up the last three  
25 weeks before the closing of the sale that were

<p style="text-align: right;">Page 289</p> <p>1 GRIFFITH</p> <p>2 not included in Exhibit 28; is that correct?</p> <p>3 A. Well, there's an actual week across</p> <p>4 both of them.</p> <p>5 Q. I'm sorry?</p> <p>6 A. It picks up the last two weeks, yes.</p> <p>7 Q. Now, take a look, if you would, at</p> <p>8 the line item under operating disbursements for</p> <p>9 occupancy.</p> <p>10 Do you have that?</p> <p>11 A. I do.</p> <p>12 Q. In Exhibit 28, the line item</p> <p>13 occupancy, through January 26, 2019, the total</p> <p>14 amount was 103 million; is that correct?</p> <p>15 A. Where are you?</p> <p>16 Q. Line item for occupancy under</p> <p>17 operating disbursements.</p> <p>18 A. Okay.</p> <p>19 Q. If you total that across through the</p> <p>20 week of January 26, 2019, the total is</p> <p>21 \$103 million; is that correct?</p> <p>22 A. Did you say 103?</p> <p>23 Q. Yes.</p> <p>24 A. Through what period?</p> <p>25 Q. Through the week ending January 26,</p>	<p style="text-align: right;">Page 290</p> <p>1 GRIFFITH</p> <p>2 2019, week 15.</p> <p>3 A. It seems light to me.</p> <p>4 Q. Well, add it across.</p> <p>5 A. 26, 27, 28. I mean, the weeks of</p> <p>6 the 12th and the 19th are 51 on their own. I'm</p> <p>7 sorry. How much did you say it was again?</p> <p>8 Q. I added it up at 103 million.</p> <p>9 MR. GENENDER: Are we really doing a</p> <p>10 math test right now?</p> <p>11 MR. FOX: Yeah. I learned it from</p> <p>12 you. No, it's important.</p> <p>13 A. I will say it seems fine.</p> <p>14 Q. Okay. Now, if you look at</p> <p>15 Exhibit 29, on page 2, there is also a line</p> <p>16 item for occupancy that includes an additional</p> <p>17 27 million.</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. So if we add 103 million and</p> <p>21 27 million, we get 130 million, correct?</p> <p>22 A. Okay.</p> <p>23 Q. Is that right?</p> <p>24 MR. GENENDER: He just said yes.</p> <p>25 A. I'm taking your math.</p>
<p style="text-align: right;">Page 291</p> <p>1 GRIFFITH</p> <p>2 Q. Okay. Now, let's go back to</p> <p>3 Exhibit 4, paragraph 20.</p> <p>4 Instead of 130 million for</p> <p>5 occupancy, you've got 228 million.</p> <p>6 Do you see that?</p> <p>7 MR. GENENDER: Objection, form.</p> <p>8 Rent, occupancy, expenses, property</p> <p>9 taxes and property maintenance, is that</p> <p>10 what you're talking about?</p> <p>11 MR. FOX: That's the line item.</p> <p>12 Q. 228 million.</p> <p>13 A. Yeah. There's other categories</p> <p>14 included in that 228 other than just the rent</p> <p>15 or the occupancy.</p> <p>16 Q. Well, what else is included there</p> <p>17 that is not included in the weekly DIP budget?</p> <p>18 A. I believe it would probably be the</p> <p>19 property taxes, property and maintenance, other</p> <p>20 expenses.</p> <p>21 Q. They're not listed anywhere in the</p> <p>22 weekly DIP budget that we just looked at?</p> <p>23 A. They would be in other line items.</p> <p>24 Q. Where is it?</p> <p>25 A. Most likely in the other SG&amp;A</p>	<p style="text-align: right;">Page 292</p> <p>1 GRIFFITH</p> <p>2 disbursements.</p> <p>3 Q. Do you know for sure or is that your</p> <p>4 assumption?</p> <p>5 A. That's my assumption.</p> <p>6 Q. And you think property taxes are an</p> <p>7 SG&amp;A expense?</p> <p>8 A. Yeah, the occupancy line was just</p> <p>9 meant to pick up the rent roll, not all other</p> <p>10 expenses.</p> <p>11 Q. Take a look on page 3 of Exhibit 28,</p> <p>12 item number 10, other SG&amp;A disbursements.</p> <p>13 Do you see that line?</p> <p>14 A. I'm sorry. Say it again.</p> <p>15 Q. It's line 10, other SG&amp;A</p> <p>16 disbursements.</p> <p>17 Do you see that?</p> <p>18 A. Okay.</p> <p>19 Q. And it says, "Corporate SG&amp;A reduced</p> <p>20 over time to reflect a decline in home office</p> <p>21 expense associated with servicing the stores</p> <p>22 and general reductions in force. Major line</p> <p>23 items include outside services, utilities,</p> <p>24 outside contractors, marketing, equipment</p> <p>25 expenses and other non-merchandising expenses."</p>

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1 GRIFFITH  
2 Do you see any reference there to  
3 property taxes?  
4 A. Expenses associated with servicing  
5 the stores and other non-merch expenses could  
6 be potentially one of those categories.  
7 Q. Where you read "expenses associated  
8 with servicing stores," it says, "Home office  
9 expense associated with servicing the stores."  
10 A. So I would say the other non-merch  
11 expenses.  
12 Q. But you don't know for sure?  
13 A. I can't say for certain, no.  
14 Q. Turning to -- back to Exhibit 5,  
15 paragraph 24, which is your June 27  
16 supplemental declaration.  
17 Do you have that?  
18 A. I do.  
19 Q. With respect to Mr. Henrich's  
20 report, you say that, "The 506(c) surcharges he  
21 applies are insufficient."  
22 Do you see that?  
23 A. Yes.  
24 Q. And they're insufficient, given the  
25 high fixed cost and overhead of Sears; is that

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1 GRIFFITH  
2 right?  
3 A. Yes.  
4 Q. Was one of the problems Sears had  
5 was that it had overhead for a much larger  
6 store base than the number of stores it  
7 actually had?  
8 A. I would assume that was part of  
9 their problem.  
10 Q. You assume it? Do you know for  
11 sure?  
12 A. I know they ran duplicative systems,  
13 one for Sears and one for Kmart, which was  
14 probably not the most efficient way to run your  
15 store networks.  
16 Q. Did they have duplicative headcount?  
17 A. Potentially.  
18 Q. Did they have duplicative SG&A  
19 expense?  
20 A. It's hard to say based on what --  
21 you would have to give me an example. I'm not  
22 sure what you are trying to say.  
23 Q. Well, did they have it or not, do  
24 you know?  
25 A. I would need an example.

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1 GRIFFITH  
2 Q. Well, pick any SG&A expense you'd  
3 like.  
4 A. I can't think of any.  
5 Q. Did M-III and the debtors'  
6 professionals propose a plan to reduce the  
7 debtors' corporate overhead by a significant  
8 amount?  
9 A. I believe we did.  
10 Q. And that's -- and that plan assumed  
11 that the debtors could operate their store base  
12 with much lower corporate overhead, correct?  
13 A. We were working to make sure that  
14 all expenses were necessary and reasonable. So  
15 we were evaluating opportunities, yes.  
16 Q. And the plan was to reduce the  
17 corporate overhead to about -- a little under  
18 600 million per annum, correct?  
19 A. I don't recall. I was not part of  
20 that work stream.  
21 Q. Okay.  
22 (Griffith Exhibit 30, ESL Bid  
23 Analysis, Bates Stamped Sears\_507B\_31  
24 through 60, marked for identification.)  
25 Q. I show you what's been marked as

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1 GRIFFITH  
2 Exhibit 30.  
3 For the record, Exhibit 30 bears the  
4 Bates numbers Sears\_507B\_31 through 60.  
5 Do you have that in front of you?  
6 A. I do.  
7 Q. Have you seen this before?  
8 A. I may have.  
9 Q. It says on the front that -- it's  
10 got M-III Partners' name on it; is that  
11 correct?  
12 A. It does.  
13 Q. Does that mean M-III Partners had a  
14 hand in preparing this document?  
15 A. I would assume so.  
16 Q. Turn to page 19, if you would.  
17 Do you have that page?  
18 A. I do.  
19 Q. And this is labeled "Unencumbered  
20 Receivables."  
21 And it says, "Unencumbered  
22 receivables total approximately 285 million on  
23 a net basis as of September 30, 2018."  
24 Do you see that?  
25 A. Yes.

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1 GRIFFITH  
2 Q. Looking at the first line item under  
3 the heading "Ledger Account Name," it says, "AP  
4 vendor reclass post."  
5 Do you see that?  
6 A. I see that.  
7 Q. And the description is "Kmart vendor  
8 receivables (net debit reclassification i.e., a  
9 positive receivable balance after all debits  
10 netted against all credits for vendors) for  
11 55,192,000."  
12 Do you see that?  
13 A. I see that.  
14 Q. Do you know what that is?  
15 A. I don't know what that is.  
16 Q. Would it relate to returns of  
17 inventory to vendors?  
18 MR. GENENDER: Objection, lack of  
19 foundation.  
20 A. I don't know.  
21 Q. The next line item says, "Return  
22 merchandise receivable. Sears vendor  
23 receivables," and then has the same  
24 parenthetical for 52,644,000.  
25 Do you see that?

Page 298

1 GRIFFITH  
2 A. I see that.  
3 Q. Okay. To your understanding, would  
4 that be receivables from a vendor for returned  
5 inventory?  
6 A. I honestly don't know.  
7 Q. Okay. Do you know how -- what any  
8 of these particular line items of other  
9 receivables are on page 19 of Exhibit 30 -- I'm  
10 sorry -- page 19 and page 20 of Exhibit 30?  
11 MR. GENENDER: Object to the form.  
12 A. No, I'm not familiar enough with  
13 these to be able to explain any of them.  
14 Q. Do you know who might be?  
15 MR. GENENDER: Objection, calls for  
16 speculation.  
17 A. I don't know.  
18 (Griffith Exhibit 31, Stock Ledger  
19 Detail, marked for identification.)  
20 MR. FOX: Almost done.  
21 MR. GENENDER: Good. Correct.  
22 Q. Let me show you Exhibit 31.  
23 Mr. Griffith, take a look, if you  
24 would, at Exhibit 31.  
25 A. Okay.

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1 GRIFFITH  
2 Q. Do you know what this document is?  
3 A. Stock ledger detail. It says stock  
4 ledger detail.  
5 Q. And do you know what that is?  
6 A. I assume it's detail from the stock  
7 ledger.  
8 Q. This relates to inventory; is that  
9 correct?  
10 A. I would think so.  
11 Q. Is this total cost number of  
12 2,686,000,000 the same amount that was listed  
13 on page 5 of 35 to Exhibit A of Exhibit 5, your  
14 June 27 declaration?  
15 A. (Document review.)  
16 It appears to be the same number.  
17 MR. GENENDER: Except it's missing  
18 28 cents on the exhibit to his  
19 declaration.  
20 MR. FOX: Thank you, Counsel.  
21 Q. Now, do you see the -- that's in the  
22 column entitled "Cost" at the top, correct?  
23 A. Yes.  
24 Q. Okay. Now, in the next column,  
25 there's a column entitled "Selling Value."

Page 300

1 GRIFFITH  
2 Do you see that?  
3 A. I do.  
4 Q. And what's the selling value for  
5 that 2.686 billion of inventory listed here on  
6 Exhibit 31?  
7 A. It says 5,029,306,792.91.  
8 Q. And this Exhibit 31, which has Bates  
9 number Sears\_507B\_00001514 through 1522 is  
10 produced by the debtors, correct?  
11 MR. GENENDER: Object to the  
12 questioning.  
13 A. It would appear that way.  
14 Q. Just give me one minute.  
15 MR. FOX: I have nothing further.  
16 Mr. Griffith, thank you very much.  
17 MR. GENENDER: We will reserve our  
18 questions.  
19 (Time noted: 9:05 p.m.)  
20  
21  
22  
23  
24  
25

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1                   A C K N O W L E D G M E N T

2

3       STATE OF            )

4                               : ss

5       COUNTY OF            )

6

7               I, BRIAN GRIFFITH, hereby certify

8       that I have read the transcript of my testimony

9       taken under oath in my deposition; that the

10       transcript is a true, complete and correct

11       record of my testimony, and that the answers on

12       the record as given by me are true and correct.

13

14

15

16                               \_\_\_\_\_

17                       BRIAN GRIFFITH

18

19

20       Signed and subscribed to before me

21       this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

22

23

24                               \_\_\_\_\_

25       Notary Public, State of \_\_\_\_\_

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1                   C E R T I F I C A T E

2

3       STATE OF NEW YORK )

4                               : ss

5       COUNTY OF RICHMOND )

6

7               I, MELISSA GILMORE, a Notary Public

8       within and for the State of New York, do hereby

9       certify:

10              That BRIAN GRIFFITH, the witness

11       whose deposition is hereinbefore set forth, was

12       duly sworn by me and that such deposition is a

13       true record of the testimony given by such

14       witness.

15              I further certify that I am not

16       related to any of the parties to this action by

17       blood or marriage; and that I am in no way

18       interested in the outcome of this matter.

19              IN WITNESS WHEREOF, I have hereunto

20       set my hand this 12th day of July, 2019.

21

22

23

24                               \_\_\_\_\_

25       MELISSA GILMORE

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1                   \*\*\* ERRATA SHEET \*\*\*

2       ELLEN GRAUER COURT REPORTING CO., LLC

3       126 East 56th Street, Fifth Floor

4       New York, New York 10022

5       212-750-6434

6

7       NAME OF CASE: In Re: SEARS HOLDINGS CORPORATION

8       DATE OF DEPOSITION: JULY 10, 2019

9       NAME OF WITNESS: BRIAN GRIFFITH

10

11

12

13

14

15

16

17

18

19

20                               \_\_\_\_\_

21       Subscribed and sworn before me

22       this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

23

24                               \_\_\_\_\_

25       (Notary Public)       My Commission Expires:

# **Exhibit 101**



*IN RE: SEARS HOLDINGS CORPORATION, et al.*

---

*BRANDON AEBERSOLD*

*July 10, 2019*

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*Original File 277378A.txt*

*Min-U-Script® with Word Index*

<p style="text-align: right;">Page 1</p> <p>1 UNITED STATES BANKRUPTCY COURT 2 SOUTHERN DISTRICT OF NEW YORK 3 -----X 4 In Re: 5 SEARS HOLDINGS CORPORATION, et al., 6 Debtor. 7 Chapter 11 - Case No.: 18-23538 (RDD) 8 -----X 9 450 Park Avenue 10 New York, New York 11 July 10, 2019 12 8:08 a.m. 13 14 DEPOSITION of BRANDON AEBERSOLD, 15 before Melissa Gilmore, a Shorthand Reporter 16 and Notary Public of the State of New York. 17 18 19 20 21 22 23 ELLEN GRAUER COURT REPORTING CO., LLC 24 126 East 56th Street, Fifth Floor 25 New York, New York 10022 212-750-6434 REF: 277378A</p>	<p style="text-align: right;">Page 3</p> <p>1 A P P E A R A N C E S: (Cont'd) 2 3 WEIL GOTSHAL &amp; MANGES, LLP 4 Attorneys for Debtors and Debtors-in-Possession, 5 Sears Holdings Corporation, et al. 6 767 Fifth Avenue 7 New York, New York 10153 8 BY: RAY SCHROCK, ESQ. 9 PHONE 212-310-8210 10 E-MAIL ray.schrock@weil.com 11 12 13 AKIN GUMP STRAUSS HAUSER &amp; FELD LLP 14 Attorneys for Unsecured Creditors 15 One Bryant Park 16 New York, New York 10036-6745 17 BY: PATRICK J. GLACKIN, ESQ. 18 PHONE 212-872-8114 19 E-MAIL pglackin@akingump.com 20 21 22 23 24 25</p>
<p style="text-align: right;">Page 2</p> <p>1 A P P E A R A N C E S: 2 3 CLEARY GOTTSLIEB STEEN &amp; HAMILTON LLP 4 Attorneys for ESL Investments, Inc. 5 One Liberty Plaza 6 New York, New York 10006 7 BY: ANDREW WEAVER, ESQ. 8 KATHERINE LYNCH, ESQ. 9 PHONE 212-225-2354 10 E-MAIL aweaver@cgsh.com 11 kalynch@cgsh.com 12 13 14 WEIL, GOTSHAL &amp; MANGES, LLP 15 Attorneys for Debtors and Debtors-in-Possession, 16 Sears Holdings Corporation, et al. 17 200 Crescent Court, Suite 300 18 Dallas, Texas 75201-6950 19 BY: PAUL GENENDER, ESQ. 20 ERIN CHOI, ESQ. 21 PHONE 214-746-7877 22 E-MAIL paul.genender@weil.com 23 erin.choi@weil.com 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 A P P E A R A N C E S: (Cont'd) 2 3 MILBANK LLP 4 Attorneys for Cyrus Capital Partners 5 2029 Century Park East, 33rd Floor 6 Los Angeles, California 90067-3019 7 BY: ROBERT J. LIUBICIC, ESQ. 8 PHONE 424-386-4525 9 E-MAIL rliubicic@milbank.com 10 11 12 MILBANK LLP 13 Attorneys for Cyrus Capital Partners 14 55 Hudson Yards 15 New York, New York 10001 16 BY: YELENA AMBARTSUMIAN, ESQ. 17 PHONE 212-530-5080 18 E-MAIL yambartsumian@milbank.com 19 20 21 22 23 24 25</p>

Page 5

1 A P P E A R A N C E S: (Cont'd)  
2  
3 SEYFARTH SHAW LLP  
4 Attorneys for Wilmington Trust National  
5 Association, as Indenture Trustee and Collateral  
6 Agent  
7 620 Eighth Avenue  
8 New York, New York 10018-1405  
9 BY: EDWARD M. FOX, ESQ.  
10 STEVEN PARADISE, ESQ.  
11 PHONE 212-218-4646  
12 E-MAIL emfox@seyfarth.com  
13 sparadise@seyfarth.com  
14  
15  
16 ALSO PRESENT:  
17 BRIAN GRIFFITH, M-III  
18 TOM KRELLER, ESQ., Milbank (Via Telephone)  
19 TONY RUSSO, Cleary Summer Associate  
20  
21  
22  
23  
24  
25

Page 6

1 ----- I N D E X -----  
2 WITNESS EXAMINATION BY PAGE  
3 BRANDON AEBERSOLD MR. WEAVER 8  
4 MR. LIUBICIC 41  
5 MR. FOX 77  
6  
7  
8 ----- E X H I B I T S -----  
9 AEBERSOLD DESCRIPTION FOR I.D.  
10 Exhibit 1 Declaration of Brandon 11  
11 Aebersold, Dated June 27,  
12 2019  
13 Exhibit 2 Declaration of Brandon 34  
14 Aebersold, Dated  
15 February 1, 2019  
16 Exhibit 3 Declaration of Robert A. 54  
17 Riecker, Dated  
18 November 23, 2018  
19  
20  
21  
22  
23  
24  
25

Page 7

1 ----- E X H I B I T S (Cont'd) -----  
2 AEBERSOLD DESCRIPTION FOR I.D.  
3 Exhibit 4 Order Approving Amendment 78  
4 to Terms and Conditions  
5 of the Debtors'  
6 Employment and Retention  
7 of Lazard Frères and Co.,  
8 LLC, as Investment  
9 Banker, Dated January 23,  
10 2019  
11  
12  
13 (EXHIBITS TO BE PRODUCED)  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Page 8

1 BRANDON AEBERSOLD, called  
2 as a witness, having been duly sworn by a  
3 Notary Public, was examined and testified  
4 as follows:  
5  
6 EXAMINATION BY  
7 MR. WEAVER:  
8 Q. Good morning, Mr. Aebersold.  
9 A. Good morning.  
10 Q. My name is Andrew Weaver. I'm with  
11 Cleary Gottlieb Steen & Hamilton, counsel to  
12 ESL in this matter.  
13 I will remind you, which I'm sure  
14 you know, that if I ask a question today that  
15 you do not understand, please ask me to clarify  
16 the question. Okay?  
17 A. Yes.  
18 Q. I also need you to answer verbally.  
19 Headshakes, et cetera, will not be recorded on  
20 the record. Is that okay?  
21 A. Yes.  
22 Q. If you answer a question, I will  
23 assume that you understand it, okay?  
24 A. Yes.  
25 Q. What did you do to prepare for

Page 9

1 AEBERSOLD  
2 today's deposition?  
3 A. I read a few pleadings. I read the  
4 debtors' motion, and I read excerpts of the  
5 reply of certain of the second lien parties. I  
6 also reread my prior declarations in this  
7 matter.  
8 Q. All of your prior declarations in  
9 this matter?  
10 A. Two of them. I think there was  
11 three. So I think I read two of the three.  
12 Q. And which two did you read?  
13 A. The second DIP hearing declaration  
14 and the sale order declaration.  
15 Q. Did you meet with counsel?  
16 A. I had a telephone call with counsel.  
17 Q. When was that call?  
18 A. There was two calls of about 30  
19 minutes, one on Monday evening and one last  
20 evening.  
21 Q. And was there anyone else on the  
22 call besides counsel and yourself?  
23 A. On one of the calls one of my  
24 colleagues from Lazard joined and a member of  
25 M-III joined one of the calls.

Page 10

1 AEBERSOLD  
2 Q. And who was the member of Lazard who  
3 joined the call?  
4 A. Mr. Griffith.  
5 Q. And who from --  
6 MR. GENENDER: He said Lazard.  
7 A. From Lazard, Levi Quaintance.  
8 Q. And who from M-III?  
9 A. Mr. Griffith.  
10 Q. And this was in preparation for your  
11 deposition today?  
12 A. That was not -- that was the call on  
13 Monday. That was more of a general call.  
14 In terms of preparation for this  
15 deposition, that was last night and only  
16 counsel was on.  
17 Q. Did you do anything else in  
18 preparation for today's deposition?  
19 A. I don't believe so.  
20 MR. WEAVER: I'm going to mark  
21 Aebersold Exhibit Number 1, which is  
22 entitled "Declaration of Brandon  
23 Aebersold," and is dated June 27 of 2019.  
24 (Aebersold Exhibit 1, Declaration of  
25 Brandon Aebersold, Dated June 27, 2019,

Page 11

1 AEBERSOLD  
2 marked for identification.)  
3 Q. Do you see this document?  
4 A. I do.  
5 Q. Do you recognize this document?  
6 A. I do.  
7 Q. And is this the declaration that you  
8 have submitted as a part of the 507(b) dispute  
9 that we are here today about?  
10 A. Yes, it is.  
11 Q. Mr. Aebersold, are you proffering  
12 expert opinions in this dispute?  
13 A. Am I proffering expert opinions? I  
14 believe I'm a fact witness or I'm proffering  
15 fact testimony.  
16 Q. Just to be clear, this declaration  
17 that you've submitted is a fact declaration; is  
18 that correct?  
19 MR. GENENDER: Object to the form.  
20 The document speaks for itself.  
21 A. I'm not sure.  
22 Q. You have a law degree; is that  
23 correct, Mr. Aebersold?  
24 A. I do have a law degree.  
25 Q. Is your license still active?

Page 12

1 AEBERSOLD  
2 A. Certainly not.  
3 Q. You understand what a fact witness  
4 is?  
5 A. At a very high level.  
6 Q. And is it your understanding today  
7 that you are appearing as a fact witness?  
8 A. I believe so.  
9 Q. Okay. So have you been asked to  
10 provide any expert opinions in this 507(b)  
11 dispute?  
12 A. I don't believe so.  
13 Q. Do you anticipate providing any  
14 expert opinions in this 507(b) dispute?  
15 A. I'm not sure. I don't believe so.  
16 Q. Are you offering any opinions  
17 regarding the value of the second lien parties'  
18 507(b) claims in this dispute?  
19 A. I am not.  
20 Q. Are you offering any opinions as to  
21 the appropriateness of a 506(c) charge --  
22 surcharge assigned to the second lien parties'  
23 507(b) claims in this dispute?  
24 A. I am not.  
25 Q. Mr. Aebersold, if you could turn to

<p style="text-align: right;">Page 13</p> <p>1 AEBERSOLD</p> <p>2 paragraph 11 of your declaration.</p> <p>3 It states at the beginning of that</p> <p>4 paragraph, Based on my experience and</p> <p>5 participation, and as reflected in further</p> <p>6 detail in your sale declaration, the sale and</p> <p>7 restructuring process led by Lazard with the</p> <p>8 support of debtors' other advisors was</p> <p>9 extensive.</p> <p>10 Is that your opinion, Mr. Aebersold?</p> <p>11 MR. GENENDER: Objection to form.</p> <p>12 You're stopping there?</p> <p>13 MR. WEAVER: The sentence does</p> <p>14 continue, but for the record, I'm</p> <p>15 asking -- I hope it was clear. I was</p> <p>16 asking whether or not his statement was</p> <p>17 extensive.</p> <p>18 Q. Is that your opinion?</p> <p>19 A. Yeah. My view is it was extensive,</p> <p>20 but I think -- yes, that's my opinion. It was</p> <p>21 extensive.</p> <p>22 Q. And if you turn to paragraph 17, you</p> <p>23 state, "In short, I believe that the sale and</p> <p>24 restructuring process auction was the result of</p> <p>25 robust and thorough efforts by the debtors and</p>	<p style="text-align: right;">Page 15</p> <p>1 AEBERSOLD</p> <p>2 Q. And is that also your opinion?</p> <p>3 MR. GENENDER: Objection to form.</p> <p>4 A. It is.</p> <p>5 Q. Looking at paragraph --</p> <p>6 MR. FOX: I didn't hear the witness'</p> <p>7 answer.</p> <p>8 THE WITNESS: I said it is.</p> <p>9 MR. FOX: Thank you.</p> <p>10 Q. Turning to paragraph 23, starting</p> <p>11 with the second sentence, "If not for the</p> <p>12 existence of ESL as a potential going concern</p> <p>13 buyer, and the strong views expressed and</p> <p>14 actions taken by the certain second lien</p> <p>15 parties during the sale and restructuring</p> <p>16 process in support of a going concern sale and</p> <p>17 against liquidation, then the rationale for</p> <p>18 maintaining the enterprise would have been</p> <p>19 substantially removed and the only likely</p> <p>20 viable option would have been the immediate</p> <p>21 pursuit of a wind-down."</p> <p>22 Is that your testimony,</p> <p>23 Mr. Aebersold?</p> <p>24 A. Yes, it is.</p> <p>25 Q. Is that also your opinion?</p>
<p style="text-align: right;">Page 14</p> <p>1 AEBERSOLD</p> <p>2 their advisors."</p> <p>3 Is that correct? Is that your</p> <p>4 testimony?</p> <p>5 A. Yes, it is.</p> <p>6 Q. And is that also your opinion?</p> <p>7 A. Yes, it is.</p> <p>8 Q. Further down in paragraph 17 you</p> <p>9 say, "Based on my knowledge, observations and</p> <p>10 experience, the debtors and their advisors</p> <p>11 could not have performed the necessary and</p> <p>12 multiple, simultaneous work streams that</p> <p>13 comprised the sale and restructuring process</p> <p>14 (including soliciting interest for everything</p> <p>15 from liquidation bids, to bids for parts of the</p> <p>16 debtors' businesses, real estate bids and going</p> <p>17 concern bids in the related arm's length</p> <p>18 negotiations that culminated in the auction and</p> <p>19 successful bid) in a manner that was fair,</p> <p>20 reasonable and diligent in a time frame</p> <p>21 meaningfully more compressed than was available</p> <p>22 in this case."</p> <p>23 Is that your testimony,</p> <p>24 Mr. Aebersold?</p> <p>25 A. Yes, it is.</p>	<p style="text-align: right;">Page 16</p> <p>1 AEBERSOLD</p> <p>2 MR. GENENDER: Objection to form.</p> <p>3 A. Yes, it is.</p> <p>4 Q. Turning back to your testimony in</p> <p>5 paragraph 17, at the end, towards the end,</p> <p>6 where you describe -- I believe you're</p> <p>7 testifying that the sale and restructuring</p> <p>8 process was fair, reasonable and diligent.</p> <p>9 Is that your testimony?</p> <p>10 A. (Document review.)</p> <p>11 I'm sorry. Where are you?</p> <p>12 Q. Towards the end of that paragraph,</p> <p>13 where you refer to a fair, reasonable and</p> <p>14 diligent -- are you describing that you believe</p> <p>15 that the restructuring sale process was fair,</p> <p>16 reasonable and diligent?</p> <p>17 MR. GENENDER: The sale and</p> <p>18 restructuring process?</p> <p>19 MR. WEAVER: Yes.</p> <p>20 A. Yes.</p> <p>21 Q. Fair to whom, Mr. Aebersold?</p> <p>22 A. Fair to all the parties that wanted</p> <p>23 to participate as well as the company's</p> <p>24 constituents.</p> <p>25 Q. Mr. Aebersold, as a managing</p>

Page 17

1 AEBERSOLD  
2 director of Lazard, your firm was retained by  
3 the debtors at the beginning of the bankruptcy;  
4 is that correct?  
5 A. That's correct.  
6 Q. And, at some point, your engagement  
7 was amended, Lazard's engagement was amended;  
8 is that correct?  
9 A. That's correct.  
10 Q. And in paragraph 7 of your  
11 declaration, at the end the last sentence you  
12 state that the -- "There was an amendment to  
13 the engagement letter in light of additional  
14 services provided by Lazard in connection with  
15 potential sale transactions."  
16 Is that correct?  
17 MR. GENENDER: Which paragraph?  
18 MR. WEAVER: The bottom of paragraph  
19 5.  
20 MR. GENENDER: You said 7.  
21 MR. WEAVER: Did I? I apologize.  
22 MR. GENENDER: You're looking at  
23 which sentence?  
24 MR. WEAVER: The last sentence.  
25 MR. GENENDER: Got it. On

Page 18

1 AEBERSOLD  
2 January 18?  
3 MR. WEAVER: Correct.  
4 MR. GENENDER: Got it.  
5 A. (Document review.) Okay.  
6 Q. Is that correct, that the engagement  
7 letter was amended in light of additional  
8 services?  
9 A. Yes, it was.  
10 Q. What were those additional services?  
11 A. It was additional services related  
12 to sales and marketing.  
13 Q. What does that mean?  
14 A. It means running additional M&A  
15 efforts.  
16 Q. What does that mean?  
17 A. I think the scope of what we were  
18 doing expanded to market each individual asset  
19 within the company specifically, as opposed to  
20 just the company as a going concern. And so  
21 that required additional resources from the  
22 firm.  
23 Q. So under your original engagement,  
24 you were endeavoring to market the company as a  
25 whole; is that correct?

Page 19

1 AEBERSOLD  
2 A. Not specifically. We were -- our  
3 initial letter, if I remember correctly, and I  
4 don't have it here in front of me, it provided  
5 for a sale transaction, and we had the option,  
6 if requested, to provide those services broadly  
7 speaking.  
8 But from our perspective, what we  
9 were concerned about is if we got requested to  
10 sell a \$10 million asset, so to speak, and our  
11 sale transaction fee was 55 basis points, it's  
12 an onerous exercise on the firm and for us to  
13 get paid 55 basis points on a \$10 million fee  
14 may not be worthwhile.  
15 And so our letter provided that, if  
16 requested to run those sort of processes, we  
17 had to agree to do so. And around that time  
18 in -- not that time -- around the time of as  
19 early as late October and early November, the  
20 company requested not only for us to run a  
21 potential going concern sale of the entire  
22 company, but to also run isolated processes for  
23 each of the business units.  
24 And so it was the increase M&A  
25 activity around those individual processes on

Page 20

1 AEBERSOLD  
2 the specific assets that we requested an  
3 increase to the fee, and that was what the  
4 amendment was for.  
5 Q. Did the amendment increase the fee  
6 or did it increase the cap on your fee?  
7 A. It increased the cap on our fee.  
8 Q. It was still the same fee structure;  
9 is that correct?  
10 A. Yes, I believe so.  
11 Q. And at the beginning of the  
12 bankruptcy, ESL expressed a desire to be a  
13 going concern purchaser; is that correct?  
14 A. That's correct.  
15 Q. And at the time of the auction, in  
16 January of 2019, ESL was the only bidder for a  
17 complete going sale concern, correct?  
18 A. You mean going concern sale?  
19 Q. Going concern sale.  
20 A. Yes, correct.  
21 Q. What additional value add did Lazard  
22 provide in -- resulting from this additional  
23 M&A activities that you were providing?  
24 A. Additional benefits to whom?  
25 Q. To the estate.



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1 AEBERSOLD

2 A. To the estate. I think from -- one

3 piece of this is enabling that sale transaction

4 to go through. Our goal was to make sure that

5 we had a value maximizing transaction. And it

6 was certainly helpful to have run down those

7 other processes to know what proceeds those

8 assets could yield to be able to compare to a

9 going concern sale which, ultimately, was

10 helpful in effectuating the sale.

11 Q. And did that, in fact, add value to

12 the estate?

13 A. Well, I don't quite understand the

14 question, say, like our service is adding value

15 to an estate. Was it an endeavor to maximize

16 the value of the estate? Yes.

17 Whether or not it quantitatively and

18 specifically added value, I can't comment on

19 that. I don't have a view.

20 Q. Did the restructuring committee, in

21 consultation with Lazard and other advisors,

22 determine that a sale to ESL was the

23 maximizing -- value maximizing transaction for

24 the estate?

25 A. It did.

Page 22

1 AEBERSOLD

2 Q. Did the restructuring committee, in

3 consultation with Lazard and other advisors,

4 determine that the going concern sale maximized

5 value for ESL?

6 A. I can't recall that ever being a

7 determination. We were trying to maximize

8 value for the estate. However, and related to

9 that, I mean, the analysis consistently showed,

10 as we were comparing other alternatives to a

11 sale, the second lienholders were a significant

12 beneficiary of that increase of value, because

13 we're comparing the two, and one was value

14 maximizing. A substantial portion of that

15 value was accruing to the second lienholders.

16 Q. What do you mean by "substantial"?

17 A. If A is greater than B, that delta,

18 let's call it C, a significant portion of C was

19 going to the second lienholders.

20 Q. Have you quantified that value?

21 A. We did a number of times throughout

22 the pendency of the case.

23 Q. But, ultimately, the restructuring

24 committee was tasked with maximizing the value

25 of the estate as a whole, correct?

Page 23

1 AEBERSOLD

2 MR. GENENDER: Objection to form.

3 A. Lazard was focused on --

4 MR. GENENDER: Calls for a legal

5 conclusion.

6 A. Lazard was maximizing value for the

7 estate, and that's what we were seeking.

8 Q. If you turn to paragraph 23 of your

9 declaration. We looked at the second sentence

10 prior. Going over this again, the first part

11 where you say that, "If not for the existence

12 of ESL as a potential going concern buyer and

13 the strong views expressed and actions taken by

14 certain second lien parties," it goes on to

15 say, "then the rationale for maintaining the

16 enterprise would have been substantially

17 removed."

18 What do you mean by "strong views

19 expressed"?

20 A. I think I'm speaking to the

21 willingness of certain of these second

22 lienholders to support a going concern

23 transaction, which, in my opinion, decreased

24 execution risk and increased the likelihood of

25 success.

Page 24

1 AEBERSOLD

2 Q. Any other strong views that you're

3 referring to?

4 A. Not specifically.

5 Q. What about actions taken by certain

6 second lien parties, what do you mean by that?

7 A. In terms of actions, it's really

8 with respect to actions to support the company

9 in respect of a going concern sale.

10 Q. Anything else?

11 A. Not specifically.

12 Q. Is it your view that all three of

13 these were needed to -- for the rationale of

14 maintaining the enterprise to continue?

15 MR. GENENDER: Objection, form,

16 vague.

17 A. Can you repeat the question?

18 Q. Sure. Is it your view that all

19 three of these items that you list in paragraph

20 23 needed to exist in order for the rationale

21 of maintaining the enterprise to continue?

22 MR. GENENDER: Objection, form,

23 vague.

24 A. Not necessarily. I can say that the

25 fact that those three did exist were important

Page 25

1 AEBERSOLD  
2 to us maintaining the going concern. They were  
3 all factors.  
4 Whether or not if one were  
5 diminished, that's a hypothetical I can't  
6 answer.  
7 Q. Was it the restructuring committee's  
8 view throughout this process that a going  
9 concern sale would result in a value maximizing  
10 transaction for the estate?  
11 MR. GENENDER: Objection, foundation  
12 and calls for speculation.  
13 A. Your question states it as if it  
14 were a fact throughout, and I wouldn't say that  
15 necessarily was the case.  
16 I think there was optimism that a  
17 going concern sale could and had a decent  
18 likelihood of being value maximizing.  
19 Q. And in all of your discussions with  
20 the restructuring committee when you were  
21 analyzing potential transactions, did the  
22 restructuring committee ever consider, as a  
23 driving factor of their deliberations, the  
24 benefit to ESL from a going concern  
25 transaction?

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1 AEBERSOLD  
2 A. I don't think we ever specified it  
3 as it's a benefit to ESL, but there were  
4 certainly times at which the benefit to the  
5 second lienholders was a driving consideration.  
6 Q. Why was it a driving consideration?  
7 A. It's the same as my answer  
8 previously, which is if the going concern sale  
9 was value maximizing, we analyzed where was  
10 that value flowing, and potentially all of the  
11 analysis, it would show that all the other  
12 secured creditors, but the creditors, generally  
13 speaking, were no worse off in a going concern  
14 sale, but it was a material benefit to the  
15 second lienholders.  
16 Q. Is that the only increased benefit?  
17 A. Not the only. Certainly not  
18 exclusive benefit.  
19 Q. What other benefits were there?  
20 A. Well, as you see in a prior  
21 declaration, I list out the benefits to the  
22 estate. We're on record saying there's a  
23 number of benefits.  
24 Q. And in those prior declarations, did  
25 you ever state one of the benefits was

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1 AEBERSOLD  
2 increased value for ESL?  
3 MR. GENENDER: Objection to form.  
4 The document speaks for itself.  
5 A. I don't believe that sentence is in  
6 my prior declaration.  
7 Q. The --  
8 A. Can I correct that?  
9 Q. Of course, you can.  
10 A. Because I don't know what's  
11 incorporated into my declaration and what's  
12 not, but in Exhibit 3, I believe, or 4 to my  
13 most recent declaration, in a letter from  
14 Cleary to the board of directors, it references  
15 that statement, that the second lienholders  
16 are, in fact, the only significant beneficiary  
17 amongst the secured creditors of a going  
18 concern sale.  
19 And so that was based on  
20 conversations I had had with advisors to second  
21 lien parties, and so I guess, in a way, it is  
22 in my declaration, but I just want to be clear  
23 that that's referenced.  
24 Q. Sure. Exhibit 3 is attached to your  
25 declaration we have marked as Exhibit 1.

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1 AEBERSOLD  
2 MR. GENENDER: I think we are  
3 talking Exhibit A, B and C.  
4 A. Sorry. It's Exhibit C.  
5 Q. Can you direct me to the language  
6 that you're referring to in that document?  
7 A. Yes, it may take a second.  
8 Q. That's fine.  
9 A. (Document review.) I found it.  
10 Q. Where were you looking?  
11 A. Page 5 of the letter, which is  
12 page 35 of 36 of the declaration, second full  
13 paragraph, the sentence beginning in the middle  
14 of the third line, "Based on extensive  
15 conversations with advisors to the debtors and  
16 the subcommittee, all senior creditors, other  
17 than ESL and Cyrus, will be treated virtually  
18 the same and are, thus, indifferent to the form  
19 of a resolution under a liquidation or a going  
20 concern proposal. Moreover, the liquidation  
21 scenarios shared with ESL are hopelessly  
22 wrong."  
23 That's it. It's the fourth line  
24 there.  
25 Q. Just to finish the line that you

Page 29

1 AEBERSOLD  
2 were reading --  
3 A. "Moreover, the liquidation scenarios  
4 shared with ESL are hopelessly wrong, ignoring  
5 the hundreds of millions of dollars owed to ESL  
6 and Cyrus in respect of adequate protection,  
7 replacement liens and super-priority claims  
8 under 507(b), which must be paid before general  
9 administrative claims."  
10 Q. Did you agree with the sentence that  
11 you just read regarding the liquidation  
12 scenarios shared with ESL are hopelessly wrong?  
13 A. I don't have an opinion on the  
14 letter from Cleary.  
15 Q. So is it your testimony you have no  
16 opinion as to this letter?  
17 A. No. I'm just saying I haven't done  
18 an analysis in terms of the comment about  
19 507(b) claims. I was raising the paragraph  
20 because this is reflecting conversations that  
21 professionals had had with me regarding the  
22 impact on secured creditors or the senior  
23 creditors.  
24 Q. What about the impact on  
25 administrative claims?

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1 AEBERSOLD  
2 A. What do you mean, with respect to --  
3 Q. Whether or not a going concern sale  
4 would be more beneficial to administrative  
5 claims than a liquidation.  
6 A. I think a going concern sale, just  
7 generally speaking, it was beneficial to them  
8 to have a going concern sale.  
9 Q. Why was it beneficial?  
10 A. Because there were fewer of them and  
11 the recovery was higher.  
12 Q. Why was the recovery higher?  
13 MR. GENENDER: Objection, form.  
14 A. Because there were less of them. A  
15 liquidation would have generated significant  
16 additional administrative claims.  
17 Q. Would a liquidation also have  
18 generated larger super-priority claims by  
19 second lienholders?  
20 MR. GENENDER: Objection, calls for  
21 legal conclusion.  
22 A. Yeah, I don't know.  
23 Q. So as an advisor to the debtors, the  
24 restructuring committee of the debtors, you  
25 have no opinion as to whether a liquidation

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1 AEBERSOLD  
2 would have increased the size and volume of  
3 adequate protection and super-priority claims  
4 of the second lien creditors?  
5 MR. GENENDER: Objection, misstates  
6 testimony and assumes facts not in  
7 evidence.  
8 A. I did not perform a liquidation  
9 analysis.  
10 Q. Did Lazard do anything to solicit  
11 ESL's bid for a going concern sale?  
12 A. Yes.  
13 Q. What did it do?  
14 A. It prepared marketing materials. It  
15 provided access to diligence. It answered  
16 diligence questions. It negotiated terms of a  
17 potential bid. It gave guidance on how to  
18 improve its bid.  
19 There were a host of other  
20 activities related to generating bids in an  
21 ultimately successful bid from ESL.  
22 Q. In your view, did ESL's bids, as you  
23 describe, improve?  
24 A. It did improve over the course of  
25 the case.

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1 AEBERSOLD  
2 Q. Did those improved bids increase the  
3 value to the estate?  
4 A. Yes.  
5 Q. Did that increased value benefit  
6 ESL?  
7 A. Did their increase of a bid increase  
8 value to ESL?  
9 Q. Did the increase in value that you  
10 said the estate received from the improved  
11 bids, did that increase in value provide a  
12 benefit to ESL?  
13 A. Well, I think it did because it's  
14 not as if there were other going concern  
15 bidders that ESL was bidding against, right?  
16 Because if that was the only outcome here, the  
17 sale of a going concern, and there were  
18 multiple bids, probably more of zero sum game  
19 at that point, but that's not what this process  
20 was.  
21 It was a going concern sale with one  
22 potential buyer versus other alternatives that  
23 were not a going concern sale.  
24 And so their increase in value in  
25 the bid enabled them to be successful.

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1 AEBERSOLD  
2 Whereas, had they not improved the bid, we  
3 would have pivoted to an orderly wind-down. So  
4 I could argue, yes, they were benefited.  
5 Q. ESL as a whole or ESL as a second  
6 lien party?  
7 A. Both.  
8 Q. And the value of the credit bid  
9 under the ESL bid was approximately  
10 433 million; is that correct?  
11 A. That's correct.  
12 Q. Total consideration for the going  
13 concern bid at the end of the day was  
14 approximately 5.2 billion; is that correct?  
15 A. That was ESL's number.  
16 Q. Do you have a different number?  
17 A. The issue with that number is it  
18 takes certain liabilities at their notional  
19 amount, which I think, if you were viewing a  
20 typical M&A bid, there are arguably pieces of  
21 working capital that wouldn't be part of the  
22 bid.  
23 Q. So do you have a different number?  
24 MR. GENENDER: Objection, form,  
25 asked and answered.

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1 AEBERSOLD  
2 Q. I didn't hear yes or no.  
3 A. Not sitting here today, no.  
4 Q. You would agree that the total  
5 consideration paid was significantly more than  
6 the 433 million of the credit bid, correct?  
7 A. Yes.  
8 (Aebersold Exhibit 2, Declaration of  
9 Brandon Aebersold, Dated February 1, 2019,  
10 marked for identification.)  
11 Q. Mr. Aebersold, the court reporter  
12 has handed you what's been marked as Exhibit  
13 Number 2, a document also entitled "Declaration  
14 of Brandon Aebersold," this one dated  
15 February 1, 2019.  
16 Do you see that?  
17 A. Yes.  
18 Q. Is this your declaration in support  
19 of the sale hearing?  
20 A. Yes.  
21 Q. This is also your sworn testimony  
22 before the court; is that correct?  
23 A. Yes.  
24 Q. If you could turn to paragraph 11,  
25 I'm looking at the second to last sentence in

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1 AEBERSOLD  
2 this paragraph, where you stated, "Ultimately,  
3 the restructuring committee, in consultation  
4 with Lazard and its other advisors, determined  
5 that a single going concern transaction for all  
6 or substantially all of the debtors' businesses  
7 provided the best opportunity to maximize value  
8 for the debtors, preserve jobs and mitigate the  
9 creation of additional claims against the  
10 debtors. Other alternatives, including a  
11 potential orderly wind-down of the business  
12 were considered throughout the process."  
13 Was that your testimony then?  
14 A. Yes.  
15 Q. Is it still your testimony today?  
16 A. Yes.  
17 Q. You state, "Mitigate the creation of  
18 additional claims against the debtors."  
19 What do you mean by that?  
20 A. That if we had liquidated, certain  
21 additional claims would have arose.  
22 Q. For example?  
23 A. For example, terminating employees.  
24 If we were to terminate all the employees of  
25 the company, that would certainly give rise to

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1 AEBERSOLD  
2 additional claims.  
3 Q. Would there also be additional  
4 claims by secured creditors?  
5 A. I'm not sure.  
6 Q. You're not sure.  
7 Sitting here today, you're not sure  
8 if liquidation would have led to larger 507(b)  
9 claims by the second lien parties, for example?  
10 A. I didn't analyze that. Again, I  
11 didn't do a liquidation analysis. I don't  
12 believe that, when I made this comment about  
13 the creation of additional claims, I was  
14 talking about that. I think I was talking  
15 about more of the tangible claims that would  
16 have arose.  
17 Q. So, at any point, did you think  
18 about the possibility of claims by second lien  
19 parties in a liquidation?  
20 MR. GENENDER: Objection, vague.  
21 A. I'm sure I did, but sitting here  
22 today, I can't recall specifically.  
23 Q. The decision to enter into a going  
24 concern sale was made by the restructuring  
25 committee, correct?



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1 AEBERSOLD  
2 A. The decision? They agreed to pursue  
3 that path. I don't know if a decision was --  
4 so I'm taking issue for the decision.  
5 Q. That's fine. I asked you to ask me  
6 to clarify if you don't understand.  
7 MR. GENENDER: Let's let him finish  
8 his answer, though.  
9 A. What do you mean by "decision"?  
10 Q. During the auction, at the end of  
11 the auction, it was decided to accept ESL's  
12 bid, correct?  
13 A. That's correct.  
14 Q. Who made that decision?  
15 A. The company made that decision, and  
16 it was the special committee or the  
17 restructuring committee, whatever the name is,  
18 as a subset of the board that authorized it.  
19 Q. ESL did not decide, on behalf of the  
20 debtors, to enter into this transaction,  
21 correct?  
22 A. They did not.  
23 MR. WEAVER: Let's take a quick  
24 break. I'm just going to go through  
25 notes.

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1 AEBERSOLD  
2 (Recess taken.)  
3 BY MR. WEAVER:  
4 Q. Mr. Aebersold, if you could look at  
5 Exhibit 1, which is your declaration here in  
6 this 507(b) matter. If you look at paragraph  
7 1, which I think is on the second page --  
8 actually, there's two number ones. Fair  
9 enough. The second number one.  
10 MR. GENENDER: That was our trick,  
11 Andrew. We had two number ones.  
12 MR. WEAVER: Almost fell for it.  
13 MR. GENENDER: Sorry about that.  
14 Q. You testify, at the top of page 2,  
15 that you submit this declaration in support of  
16 entry of the 507(b) response by the debtors.  
17 Do you see that?  
18 A. I do.  
19 Q. How is this declaration in support  
20 of that response?  
21 MR. GENENDER: Objection, calls for  
22 legal conclusion.  
23 A. I think, as evidenced by the fact  
24 that this is cited in our motion, that it is in  
25 support of it.

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1 AEBERSOLD  
2 Q. Were you asked to prepare this  
3 declaration?  
4 A. Yes.  
5 Q. And were you given instructions as  
6 to what the declaration should cover?  
7 A. Not specifically.  
8 Q. So how did you determine what to put  
9 in this declaration?  
10 MR. GENENDER: I'm going to object  
11 and instruct you, in answering that  
12 question, not to reveal any communications  
13 with counsel. If you can answer that  
14 question without doing so, go ahead. He  
15 is not asking you for your communications  
16 with us.  
17 A. I can't answer that without  
18 discussing communications with counsel.  
19 Q. But your testimony was that no one  
20 instructed you to prepare this declaration,  
21 correct?  
22 MR. GENENDER: Objection,  
23 mischaracterizes testimony.  
24 A. I would say -- I was not instructed  
25 to prepare this as in someone is directing me

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1 AEBERSOLD  
2 to do so.  
3 Q. Okay. So why did you prepare it?  
4 MR. GENENDER: Same objection as to  
5 privilege.  
6 A. I can't answer that without  
7 disclosing conversations with counsel.  
8 Q. This is a declaration of you as a  
9 fact witness, correct?  
10 A. That's correct.  
11 Q. So this is your testimony as to the  
12 facts in relation to this 507 dispute, correct?  
13 MR. GENENDER: What is?  
14 Q. The testimony in this declaration.  
15 A. Let me rephrase that.  
16 I am a fact witness and this  
17 declaration is in support of that 507(b)  
18 response.  
19 Q. Okay. Did you decide which facts to  
20 place in this declaration? It's a yes-or-no  
21 question.  
22 MR. GENENDER: Object to the form of  
23 the question.  
24 A. It's not necessarily a yes-or-no  
25 question.

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1 AEBERSOLD  
2 I wrote the substantial majority of  
3 this. And in terms of topics to cover, well,  
4 that would be based on conversations with  
5 counsel.  
6 Q. Okay. I have no further questions  
7 at this point, but I think some other folks at  
8 the table do have questions for you.  
9 A. Okay. Thank you.  
10 EXAMINATION BY  
11 MR. LIUBICIC:  
12 Q. Good morning, Mr. Aebersold. I'm  
13 Rob Liubicic. I represent Cyrus Capital  
14 Partners in this case.  
15 If we can turn to your declaration,  
16 which is Exhibit 1, please. Do you have that?  
17 A. Yes, I do.  
18 Q. Okay. And let's look at paragraph  
19 8, which is on page 5.  
20 So do you see, here in paragraph 8,  
21 you define the term "process" as, "A broad  
22 array of strategic alternatives and options  
23 including a possible sale, recapitalization,  
24 reorganization, or orderly wind-down of all or  
25 substantially all of the debtors' businesses"?

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1 AEBERSOLD  
2 A. I see that.  
3 Q. And you said "including."  
4 As part of the process, did debtors  
5 explore any strategic alternatives or options  
6 that don't fall within the buckets of a  
7 possible sale, a recapitalization, a  
8 reorganization or an orderly wind-down?  
9 A. I think it depends on how broadly  
10 you define each of those terms, but you can  
11 define recapitalization and reorganization and  
12 sale broadly enough that I think would cover  
13 almost all the options that were explored.  
14 Q. Did debtors ever explore chapter 7  
15 liquidation?  
16 A. Proactively explore?  
17 Q. Correct.  
18 A. I think we evaluated a chapter 7  
19 liquidation.  
20 Q. And when did that happen?  
21 A. Pretty much throughout the entire  
22 process.  
23 Again, our concern with  
24 administrative insolvency throughout, the  
25 reason that was such a concern is because what

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1 AEBERSOLD  
2 a chapter 7 liquidation would look like.  
3 So I don't think a chapter -- well,  
4 that's enough.  
5 Q. Are there documents memorializing  
6 any evaluation of a chapter 7 liquidation?  
7 A. I'm not sure. There could be. I  
8 just can't recall specifically.  
9 Q. As you sit here today, you can't  
10 recall any?  
11 A. Well, in fairness to me, that would  
12 have been seven, eight, nine months ago. So I  
13 can't specifically recall a document.  
14 I can remember statistics being  
15 cited from a chapter 7 liquidation. So I  
16 assume that some of that analysis had been  
17 done.  
18 Q. Who do you remember reciting  
19 statistics?  
20 A. Other advisors for the company.  
21 Q. Do you remember anyone specifically?  
22 A. No.  
23 Q. Do you remember what entities those  
24 advisors were employed by?  
25 A. The company's advisors.

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1 AEBERSOLD  
2 Q. So which advisors? I'm asking,  
3 Weil, M-III, Lazard?  
4 A. Not specifically.  
5 Q. And in paragraph 8 of your  
6 declaration, when you use the phrase "orderly  
7 wind-down," that's a wind-down in a chapter 11  
8 proceeding, correct?  
9 A. Yes, presumably.  
10 Q. Let's go to paragraph 19 of your  
11 declaration. And you see in paragraph 19, you  
12 say, "The company and its advisors also had  
13 extensive discussions with Cyrus."  
14 Do you see that?  
15 A. I do.  
16 Q. Okay. And then you say, "Cyrus was  
17 actively involved throughout the process,  
18 including in pre-filing discussions regarding  
19 the DIP financing, as the ultimate arranger and  
20 funding party to the junior DIP financing, and  
21 in the negotiations regarding the going concern  
22 sale (as a provider of financing to effectuate  
23 the ESL bid)."  
24 Do you see that?  
25 A. Yes, I do.



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1 AEBERSOLD  
2 Q. Okay. So let's unpack this a bit.  
3 If we focus on your phrase  
4 "pre-filing discussions regarding the DIP  
5 financing," what pre-filing discussions with  
6 Cyrus are you referring to?  
7 A. Discussions before filing regarding  
8 financing.  
9 Q. And who had those discussions with  
10 Cyrus?  
11 A. I had financing discussions with  
12 them a couple weeks before filing, and then  
13 immediately preceding the filing, they were  
14 working alongside ESL with respect to the  
15 junior DIP.  
16 Q. And who at Cyrus did you have  
17 financing discussions with pre-filing?  
18 A. I apologize for not having the last  
19 name correctly or I would mispronounce, if I  
20 did, but it was Svet.  
21 Q. Svet Nikov?  
22 A. Yes.  
23 Q. Did you have those discussions with  
24 anyone else from Cyrus pre-filing?  
25 A. I had discussions with Mr. Freidheim

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1 AEBERSOLD  
2 leading up to the filing. Again, it would have  
3 been a couple weeks pre-filing and certainly  
4 financing -- financing was discussed, not  
5 necessarily -- I can't recall specifically if  
6 we talked about DIP financing, but we were  
7 talking about a financing.  
8 Q. Okay. And what did you discuss with  
9 Mr. Nikov about DIP financing pre-filing?  
10 A. I can't recall specifically.  
11 Q. Is there anything you recall about  
12 your discussions with Mr. Nikov about DIP  
13 financing pre-filing?  
14 A. Not specifically. That was going on  
15 eight or nine months ago.  
16 Q. And you mentioned a discussion with  
17 Mr. Freidheim pre-filing about financing,  
18 generally; am I right?  
19 A. Yes.  
20 Q. What do you recall about that  
21 discussion?  
22 A. Nothing specifically. However, I  
23 can remember it was in the context of how to  
24 deal with the upcoming maturity and their  
25 willingness to extend their debt or help the

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1 AEBERSOLD  
2 company deal with that upcoming maturity.  
3 That's the context of the  
4 conversation, but I can't remember anything  
5 specifically about it.  
6 Q. Okay. Have I exhausted your  
7 recollection of that conversation?  
8 A. Potentially. I can't remember a  
9 whole lot else, other than the location.  
10 Q. Do you remember anything else?  
11 A. The one with Mr. Freidheim and Nikov  
12 was at the law firm of Wachtell Lipton Rosen &  
13 Katz, and discussions pre-filing were at Weil  
14 Gotshal through ESL, but I can't remember the  
15 specifics.  
16 Q. Anything else you remember?  
17 A. Not specifically.  
18 Q. And what, if anything, did the  
19 pre-filing discussions that you've testified  
20 about have to do with a going concern sale?  
21 A. Well, keep in mind the only reason  
22 that we needed or sought the junior DIP, of  
23 which Cyrus was ultimately the provider, but  
24 even in the early phases, the reason we needed  
25 it is because that liquidity was required to

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1 AEBERSOLD  
2 bridge us to a going concern sale. Whereas, if  
3 we had immediately pivoted to an orderly  
4 wind-down or liquidation, we didn't need that  
5 capital.  
6 So it was all in the context of  
7 getting to a going concern sale.  
8 Q. Now, the DIP financing discussions  
9 that occurred pre-filing, which DIP financing  
10 are you referring to?  
11 A. The junior DIP financing. Again,  
12 through ESL, as ESL was the only likely  
13 provider of that capital pre-petition, and they  
14 were working alongside Cyrus at the time, or so  
15 it was represented to me.  
16 Q. The DIP financing that was being  
17 discussed with Cyrus pre-filing was not the  
18 same junior DIP that was ultimately approved by  
19 the court in November, correct?  
20 A. Not precisely, but that same general  
21 structure, yes.  
22 Q. ESL was not involved with the junior  
23 DIP that was approved by the court in November,  
24 correct?  
25 A. Sorry. Just to get the timeline

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2 correct so that we're clear when I talk about

3 which DIP and when.

4 Pre-petition discussions with ESL,

5 of which it was represented to us that Cyrus

6 was a party of getting this together, they put

7 a term sheet and a structure together on the

8 junior DIP.

9 When we filed, we only sought

10 authorization of what I call the ABL DIP or the

11 senior DIP. However, we filed the term sheet

12 with respect to the junior DIP financing, as it

13 wasn't ready to be funded and negotiations

14 weren't completed, and also gave us the

15 opportunity to have a structure to market.

16 That same structure, generally

17 speaking, is what ultimately was put in front

18 of the court and funded, with Cyrus arranging

19 that financing. There were modifications, but,

20 generally speaking, it was directionally the

21 same structure.

22 Q. Okay. So the term sheet -- the ESL

23 Cyrus term sheet was never put to the court for

24 approval, correct?

25 A. That specific term sheet, I don't

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1 AEBERSOLD

2 believe we ever sought approval for. However,

3 we did file it.

4 Q. And if we were to compare the terms

5 of the proposed ESL Cyrus junior DIP, that you

6 testified to, against the terms of the

7 Cyrus-led junior DIP that the court actually

8 approved, we put those terms side by side, they

9 are not the same, correct?

10 A. They are not the same, correct.

11 Q. Do you recall that, in or about

12 early November of 2018, you indicated to

13 Mr. Nikov that Cyrus should submit a proposal

14 for a DIP that didn't include ESL as a funder?

15 A. What was the date again? I'm sorry.

16 Q. In or about early November of 2018.

17 A. Generally, yes. I remember

18 expressing that there was a way to do one

19 without it, and it would actually be helpful if

20 the largest, quote/unquote, insider of the

21 company wasn't a part of that financing.

22 Q. And you put Mr. Nikov in touch with

23 Mudrick and Fir Tree to discuss potentially

24 working on a DIP; is that right?

25 A. I can't recall specifically the

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1 AEBERSOLD

2 timing of that or if those were, in fact, the

3 parties. I do know that we made efforts to put

4 them in touch with other potential lenders to

5 fill out a DIP financing.

6 Q. Do you recall any other potential

7 lenders that you made efforts to put Cyrus in

8 touch with?

9 A. Not specifically, but it's very

10 possible that we had either allowed them to

11 speak with other holders by releasing them from

12 a provision under their NDA with respect to

13 certain lenders, or directly put them in touch,

14 I can't be sure, but there is a decent chance

15 of that.

16 Q. Fair to say you saw benefit to Cyrus

17 doing a junior DIP with someone other than ESL?

18 A. Sure.

19 Q. The company ultimately made a

20 decision to enter into a junior DIP financing

21 with Great American, correct?

22 A. That's correct.

23 Q. And Great American had negotiated

24 the terms of that proposed DIP financing

25 agreement with the debtors; is that right?

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1 AEBERSOLD

2 A. Well, they had negotiated with the

3 company, sure.

4 Q. And debtors filed a motion for

5 approval of that proposed Great American DIP,

6 correct?

7 A. I believe so.

8 Q. On the day of the hearing on that

9 motion, Cyrus agreed to provide junior DIP

10 financing on substantially similar terms as

11 Great American, plus some enhancements, right?

12 A. They agreed to provide the junior

13 DIP financing on more beneficial terms to the

14 company.

15 Q. And I understand you were involved

16 in negotiating that deal with Cyrus in the

17 courthouse; is that right?

18 A. I was involved, yes.

19 Q. If Cyrus didn't provide the junior

20 DIP financing and Great American did, Cyrus

21 would have been primed by Great American;

22 correct?

23 A. Help me with that. In which way?

24 Q. Great American would have had

25 priority over Cyrus as a result of providing

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1 AEBERSOLD  
2 junior DIP financing.  
3 A. Priority where?  
4 Q. Priority in a payment waterfall.  
5 A. Not necessarily.  
6 Q. And why do you say that?  
7 A. I can't recall specifically, but I  
8 don't believe the Great American DIP financing,  
9 nor the ultimate Cyrus DIP financing, primed  
10 the second lien lenders.  
11 Q. Great American is a liquidator,  
12 correct?  
13 A. I believe so.  
14 Q. Were you of the view that one of the  
15 reasons Great American may have wanted to  
16 provide DIP financing was so that it would have  
17 a leg up on being engaged as the debtors'  
18 liquidator if the debtors ultimately decided to  
19 go in that direction?  
20 A. Sorry. What was the first part your  
21 question?  
22 Q. Were you of the view that one of the  
23 reasons Great American may have wanted to  
24 provide DIP financing was so that it would have  
25 a leg up on being engaged as the debtors'

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1 AEBERSOLD  
2 liquidator if the debtors ultimately decided to  
3 go in that direction?  
4 A. I don't know if it's fair to say  
5 that that was my view. It certainly crossed my  
6 mind. And if I'm not mistaken, I even asked  
7 the question of them, and I was given  
8 explanation about how the two businesses are  
9 totally siloed.  
10 So I'm not sure it's fair to say  
11 that was my view at the time we went for  
12 approval of it, but it's fair to say it crossed  
13 my mind.  
14 (Aebersold Exhibit 3, Declaration of  
15 Robert A. Riecker, Dated November 23,  
16 2018, marked for identification.)  
17 Q. Mr. Aebersold, I'm showing you  
18 what's been marked as Exhibit 3, which is  
19 titled "Declaration of Robert A. Riecker," and  
20 it's dated November 23, 2018.  
21 So, Mr. Aebersold, have you ever  
22 seen this declaration?  
23 A. (Document review.)  
24 I'm not sure I have.  
25 Q. Okay. So as I read this

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1 AEBERSOLD  
2 declaration, it was submitted in support of a  
3 DIP motion and the junior financing package,  
4 for what that's worth.  
5 Let's take a look at paragraph 14.  
6 So do you see in paragraph 14, Mr. Riecker  
7 said, starting with the second sentence, "Based  
8 on knowledge of the company's projected cash  
9 needs, even if the debtors pivot to a  
10 liquidation, the \$350 million in incremental  
11 liquidity to be provided by the junior DIP  
12 financing is critical to see the debtors  
13 through liquidation, fund going-out-of-business  
14 sales and send a message to the market that  
15 debtors have sufficient capital."  
16 Do you see that?  
17 A. I do.  
18 Q. Do you believe there was anything  
19 inaccurate about that statement by Mr. Riecker  
20 that was filed with the court?  
21 A. I haven't done any analysis on what  
22 it would cost to liquidate the company. So I  
23 don't have any reason to disagree with him.  
24 Q. So would you agree that, at the time  
25 the junior DIP was being approved, debtors were

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1 AEBERSOLD  
2 not entering into the junior DIP solely as a  
3 means of financing to get to a sale to ESL?  
4 MR. GENENDER: Objection, form.  
5 A. That's not necessarily true, because  
6 this was filed on November 23. If you rewind  
7 to October -- if we were liquidating then, I'm  
8 actually not sure we needed the \$350 million  
9 junior DIP.  
10 Q. Okay. But do you disagree that, in  
11 November of 2018, you did need the \$350 million  
12 junior DIP, even if the company were to pivot  
13 to a liquidation?  
14 MR. GENENDER: Objection, asked and  
15 answered.  
16 A. Yeah. I have no reason to disagree  
17 with Mr. Riecker, but there's several reasons  
18 stated in this sentence why we need the junior  
19 DIP.  
20 And also when you say liquidation,  
21 that can take a number of different forms. If  
22 we were going to do it -- depends on how we  
23 were going to do it. If we -- obviously, we're  
24 going to liquidate through chapter 7, we don't  
25 need it. I think there's varying degrees of

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1 AEBERSOLD  
2 how much you would need of it.  
3 Q. Okay. So I want to make sure I  
4 understand your testimony.  
5 Is it your testimony here today  
6 that, in November of 2018, debtors did not need  
7 \$350 million of liquidity being provided by a  
8 junior DIP in the event debtors were to pivot  
9 to a liquidation?  
10 A. I don't think that's what I  
11 testified to. I said that there were a number  
12 of reasons providing the 350. I have no reason  
13 to disagree with Mr. Riecker.  
14 However, I'm not sure what that  
15 number is, if it was a immediate pivot to  
16 certain types of liquidation.  
17 Q. Okay. So now let's turn back to  
18 paragraph 19 of your declaration, Exhibit 1.  
19 MR. GENENDER: Exhibit 1.  
20 Q. So you say that Cyrus was actively  
21 involved throughout the process, and we've  
22 discussed some of the phraseology that follows  
23 that. Then I want to focus on the negotiations  
24 regarding the going concern sale.  
25 Do you see that?

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1 AEBERSOLD  
2 A. Yes.  
3 Q. Okay. So as I read this paragraph,  
4 you're saying that the company and its advisors  
5 had extensive discussions with Cyrus, including  
6 in negotiations regarding the going concern  
7 sale.  
8 Were there negotiations with Cyrus  
9 regarding the going concern sale?  
10 A. There were discussions regarding a  
11 going concern sale. Yeah, in terms of the  
12 economics, as the economics had more of an  
13 impact to the ultimate buyer, that was handled,  
14 you know, through ESL, but we certainly had  
15 discussions with him on the going concern sale.  
16 Q. What substantive discussions did  
17 debtors or its advisors have with Cyrus, as far  
18 as you're aware, regarding any aspect of the  
19 going concern sale other than discussions about  
20 rolling the junior DIP?  
21 A. That was the primary discussion, was  
22 around rolling their existing financing into  
23 the new structure and supporting -- overall  
24 supporting the going concern sale.  
25 Q. What do you mean by "overall

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1 AEBERSOLD  
2 supporting the going concern sale"?  
3 A. I can't remember if there's -- their  
4 treatment of other debt, other than the junior  
5 DIP, but if there were other pieces of debt,  
6 how they were dealing with that.  
7 If I'm not mistaken, another  
8 facility, which they were a part, may have been  
9 rolled into the new structure, but I can't --  
10 Q. But you're not sure?  
11 A. I'm not sure sitting here today.  
12 Q. Can you recall any other discussions  
13 with Cyrus that you would put under the heading  
14 of overall supporting the going concern sale,  
15 other than what you've already testified about?  
16 A. Not specifically. Again, we were  
17 having a tremendous number of discussions with  
18 a lot of parties. I can remember quite a  
19 number of telephone conversations with people  
20 at Cyrus. I just can't remember the specifics.  
21 Q. So other than rolling the junior DIP  
22 and what you've already testified to about  
23 overall supporting the going concern sale, do  
24 you have any recollection of discussions with  
25 Cyrus about the going concern sale?

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1 AEBERSOLD  
2 A. About the going concern sale? Not  
3 specifically.  
4 Q. You were actively involved in the  
5 auction that resulted in the sale to ESL,  
6 correct?  
7 A. Correct.  
8 Q. Okay. About how many days or hours  
9 did the auction last?  
10 A. It was a few days. If you want a  
11 specific answer, I can do the math from my  
12 declarations, but I don't know specifically.  
13 Q. Two to three days does that sound  
14 about right?  
15 A. Two to four days.  
16 Q. Okay. And over -- over those two to  
17 four days, about how many discussions did you  
18 personally have with ESL or its advisors about  
19 substantive aspects of ESL's bid?  
20 A. I can't recall specifically, but  
21 there were a number of conversations.  
22 Q. Would it be over a dozen?  
23 A. I can't be specific.  
24 Q. Would you say there were numerous?  
25 A. There were numerous.



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1 AEBERSOLD

2 Q. And over that same time period, how

3 many discussions did you personally have with

4 Cyrus or its advisors about substantive aspects

5 of ESL's bid?

6 A. I can't recall specifically. I can

7 remember one telephone conversation during that

8 time period, but I can't be specific.

9 Q. Do you remember what was discussed

10 on that one telephone conversation?

11 A. Not specifically.

12 Q. Do you remember any discussions

13 other than that one telephone conversation

14 during that period?

15 A. Not specifically.

16 Q. The auction took place at Weil,

17 correct?

18 A. That's correct.

19 Q. Was anyone from Cyrus present at the

20 auction?

21 A. I'm not sure.

22 Q. ESL had its own room at Weil during

23 the auction, correct?

24 A. Correct. Yes.

25 Q. Do you know if anyone from Cyrus was

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1 AEBERSOLD

2 ever in that room during the auction? And when

3 I say "from Cyrus," I mean from Cyrus or its

4 advisors.

5 A. Meaning its law firm or investment

6 bank?

7 Q. Correct.

8 A. I can't recall specifically.

9 Q. Do you know how much time during the

10 auction Cyrus and its advisors spent with ESL

11 and its advisors?

12 A. You're asking me if I know how much

13 time two parties other than mine spent

14 together?

15 Q. Correct.

16 A. Yeah. No.

17 Q. During this time period, the two to

18 four days, did you have any discussions with

19 Cyrus' advisors about substantive aspects of

20 ESL's bid?

21 A. Substantive aspects of ESL's bid?

22 Q. Correct.

23 A. I can't recall specifically.

24 Q. Do you recall having any discussions

25 with any of Cyrus' advisors during that two to

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1 AEBERSOLD

2 four-day period about anything?

3 A. I can't recall specifically. I do

4 know that, at certain points in time, Cyrus'

5 role in a going concern bid was an important

6 issue. Whether I spoke directly to Cyrus

7 advisors or it was through ESL's advisors, I

8 can't recall specifically.

9 Q. You would agree ESL's advisors don't

10 represent Cyrus, correct?

11 A. Sure.

12 MR. GENENDER: Objection, form.

13 Q. And are you aware of anyone at the

14 debtors or any of its advisors having

15 substantive discussions with Cyrus or its

16 advisors during this two to four-day period of

17 the auction?

18 A. I can't recall specifically.

19 Q. And you are familiar with the credit

20 bid piece of the going concern sale?

21 A. Generally speaking.

22 Q. Was it your understanding that Cyrus

23 had the ability to not participate in the

24 credit bid if that's what it preferred?

25 A. Is it my understanding that they had

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1 AEBERSOLD

2 the ability not to participate? Is that your

3 question?

4 Q. Correct.

5 A. I'm just not sure exactly what the

6 intercreditor agreement says in that regard.

7 Q. Would it surprise you if ESL held

8 enough of the debt that was being credit bid,

9 that ESL had the ability to drag Cyrus along on

10 the credit bid?

11 MR. GENENDER: Objection, assumes

12 facts not in evidence.

13 Q. I'm just asking if you know.

14 A. I think you asked if I would be

15 surprised? I don't think I would be surprised.

16 Q. And you personally were not involved

17 in any discussions with Cyrus about rolling the

18 junior DIP, correct?

19 A. No. I had conversations over the

20 course of the case regarding that with Cyrus, I

21 believe. I remember it coming up on a phone

22 conversation that I had with -- I think it was

23 with Cyrus or Cyrus advisors. I just remember

24 because I was on the FDR going to the airport,

25 and I remember that conversation and thinking,

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1 AEBERSOLD  
2 for this bid to be successful, we're going to  
3 need some help with that junior DIP.  
4 Q. And do you know approximately when  
5 that conversation happened?  
6 A. No clue.  
7 Q. I take it that was not during the  
8 period of the auction?  
9 A. Unlikely so.  
10 Q. So it would have been before the  
11 auction at some point?  
12 A. Yes.  
13 Q. Do you know for a fact what Cyrus'  
14 motivation was in agreeing to roll the junior  
15 DIP?  
16 A. As a matter of fact? I do not know  
17 as a matter of fact someone else's motivation.  
18 Q. Would you agree with me that it was  
19 debtors who asked Cyrus to roll the junior DIP?  
20 A. The request was out there. Whether  
21 that directly came from the debtors or from the  
22 ultimate purchaser, I can't recall  
23 specifically.  
24 Q. Okay. So as far as you recall,  
25 there was a request made to Cyrus, either by

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1 AEBERSOLD  
2 the debtors or the ultimate purchaser?  
3 MR. GENENDER: Objection, calls for  
4 speculation.  
5 A. Yeah. Sorry. I don't know the  
6 genesis of those conversations. I know, from  
7 the debtors' perspective, we thought it would  
8 be helpful. I'm sure ESL, as the purchaser,  
9 appreciated it as well, but the genesis of that  
10 conversation, I can't recall specifically.  
11 Q. Has anyone at Cyrus or its advisors  
12 ever stated to you that Cyrus favored a going  
13 concern sale?  
14 A. I can't recall the specifics. It  
15 could have actually been after the sale, but I  
16 can remember having a discussion on that topic.  
17 Q. What's the general discussion that  
18 you think you remember?  
19 A. Generally speaking, that the second  
20 lienholders would have done worse if the going  
21 concern sale had not gone through. And I  
22 think, to the point on the junior DIP, that the  
23 junior DIP potentially was at risk if it had  
24 not been handled in the going concern sale.  
25 Q. And who was that discussion with?

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1 AEBERSOLD  
2 A. I can't recall specifically, but it  
3 would either have been with their investment  
4 banking advisor or with a member of Cyrus and  
5 it would have been Svett.  
6 Q. So you can't recall, but it could  
7 have been Svett or Cyrus' investment banking  
8 advisor?  
9 A. I can't recall specifically.  
10 Q. When you say Cyrus' investment  
11 banking advisor, who are you referring to?  
12 A. The team at Perella Weinberg.  
13 Q. And who at Perella Weinberg?  
14 A. It would have been Bruce Mendelsohn.  
15 Q. So you can't remember who this  
16 conversation was with.  
17 Do you remember when it was?  
18 A. Like I said, I couldn't remember if  
19 it was before the auction or immediately after.  
20 So, no, I can't recall specifically.  
21 Q. And do you recall anything specific  
22 that this person whom you can't remember  
23 actually said?  
24 A. Not specifically.  
25 Q. Have I exhausted your recollection

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1 AEBERSOLD  
2 of that conversation?  
3 A. Not necessarily.  
4 Q. What else do you remember about that  
5 conversation?  
6 A. That, in general, they were in  
7 agreement that a going concern sale was credit  
8 enhancing to them as opposed to if we had done  
9 an orderly liquidation with respect to the  
10 junior DIP and the collateral underlying that  
11 loan.  
12 Q. But you're not changing any of the  
13 testimony you've just given me in the last few  
14 minutes about this conversation, right, and  
15 your recollection of it?  
16 MR. GENENDER: Objection, form.  
17 A. Yeah, not sitting here today. I  
18 would need to put some more thought and look  
19 back at records, maybe, with respect to timing.  
20 But, no, I think that's pretty exhaustive  
21 sitting here today.  
22 Q. Okay. Let's look in your  
23 declaration at paragraph 21, please. It's on  
24 page 8.  
25 And do you see there you said -- you



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2 make reference to the second lien parties with

3 whom Lazard was engaged, and you state that

4 they consistently took the position that a

5 liquidation would be inferior to a going

6 concern sale.

7 Do you see that?

8 A. Yes.

9 Q. Okay. Does the second lien parties

10 with whom Lazard was engaged, as you use it in

11 that sentence, include Cyrus?

12 A. At a high level, yes.

13 Q. What does that mean?

14 A. Yeah, in that Cyrus never took a

15 position contrary to that, and we certainly

16 received, through ESL, who represented that

17 their position was consistent.

18 Q. Okay. So let me start with the

19 first part of that.

20 I believe you said Cyrus never took

21 a position inconsistent with the idea that a

22 liquidation would be inferior to a going

23 concern sale? Is that what you said?

24 A. Yes.

25 Q. Did anyone at Cyrus or its advisors

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1 AEBERSOLD

2 ever say to you that a liquidation would be

3 inferior to a going concern sale?

4 A. Not directly from Cyrus, but it was

5 represented to us that that was Cyrus' view,

6 and I certainly didn't have any reason to

7 believe that wasn't the case.

8 Q. And I think you said it was ESL who

9 represented it?

10 A. The specific reference I made was to

11 a letter from Cleary Gottlieb on behalf of ESL.

12 Q. And is that the letter attached to

13 your declaration as Exhibit C?

14 A. Yes. When I was referencing the

15 comment earlier, yes, that's the letter.

16 Q. Okay. Were -- are there any other

17 communications from ESL or anyone else other

18 than Cyrus that led you to believe that Cyrus

19 may have felt that a liquidation would be

20 inferior to a going concern sale?

21 A. I can't recall specifically.

22 Q. Do you recall anything generally?

23 A. Yeah. I had conversations with

24 members of Cyrus about the going concern sale

25 and never in those conversations did it come up

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1 AEBERSOLD

2 that they preferred a liquidation.

3 Q. And in those conversations, did

4 anyone from Cyrus say that they preferred a

5 going concern sale?

6 A. No, they didn't need to, because

7 that was the context of the conversation. But,

8 no, not specifically.

9 Q. Okay. Turning to page 22 --

10 sorry -- paragraph 22 of your declaration. You

11 describe the three letters attached as Exhibits

12 A, B and C to your declaration.

13 Do you see that?

14 A. Yes, I do.

15 Q. And those letters are from Cleary

16 Gottlieb, correct?

17 A. (Document review.)

18 They are on Cleary Gottlieb

19 letterhead.

20 Q. And Cleary is counsel to ESL, not

21 Cyrus, correct?

22 A. I believe so.

23 Q. Would you agree that Cyrus is not

24 copied on any of those three letters?

25 A. (Document review.)

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2 I agree they are not listed on the

3 CC line of those letters.

4 Q. And would you agree that, of the

5 three letters, Cyrus is mentioned only in the

6 January 7, 2019, letter that's attached as

7 Exhibit C?

8 MR. GENENDER: Objection, form. The

9 document speaks for itself.

10 A. I'd prefer not to sit here and read

11 these letters to be able to answer that. If

12 you represent that, that's likely the case.

13 Q. Yeah, I will represent that.

14 Do you know whether anyone at Cyrus

15 or its advisors saw drafts of these letters

16 before they were sent?

17 A. I have no clue.

18 Q. And do you know whether anyone at

19 Cyrus or its advisors authorized the sending of

20 these letters?

21 A. I do not.

22 Q. Turning back to your declaration,

23 which is Exhibit 1. If we look at paragraph

24 23, do you see you stated, "If not for the

25 existence of ESL as a potential going concern

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1 AEBERSOLD  
2 buyer and the strong views expressed and  
3 actions taken by certain second lien parties,"  
4 and then it goes on to say, "The rationale for  
5 maintaining the enterprise would have been  
6 substantially removed."  
7 Do you see that sentence?  
8 A. I do.  
9 Q. Okay. When you say "certain second  
10 lien parties expressed strong views," which  
11 second lien parties are you referring to?  
12 A. Certainly ESL falls into that camp.  
13 Q. Did Cyrus express strong views in  
14 support of a going concern sale?  
15 A. (Document review.)  
16 To take the other side of that, had  
17 they -- I'm talking about certain second lien  
18 parties -- if they had expressed strong views  
19 in opposition, I think that that would have --  
20 that would have been pretty detrimental to that  
21 enterprise.  
22 Q. Okay. My question was, did Cyrus  
23 express strong views in support of a going  
24 concern sale? What's your answer to that  
25 question?

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1 AEBERSOLD  
2 A. Yeah. I think probably more with  
3 respect to their actions than with respect to  
4 directly expressing strong views orally.  
5 Q. Okay. So Cyrus did not express  
6 strong views orally in support of a going  
7 concern sale, correct?  
8 A. I think it's fair to say that either  
9 Cyrus or its advisors expressed views in  
10 support of a going concern sale.  
11 Q. And would you characterize those  
12 views as strong?  
13 A. Sure.  
14 Q. And when did Cyrus or its advisors  
15 express strong views in support of a going  
16 concern sale?  
17 A. Well, take for example the support  
18 of the DIP financing, which was a prerequisite  
19 to working towards a going concern sale, they  
20 certainly expressed strong views with respect  
21 to that.  
22 Q. Okay. And this is the DIP financing  
23 that we saw in Mr. Riecker's November 2018  
24 declaration was not necessarily earmarked to  
25 bridge to a going concern sale, correct?

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1 AEBERSOLD  
2 MR. GENENDER: Objection, misstates  
3 the evidence.  
4 Q. The DIP -- withdrawn.  
5 The DIP financing you're talking  
6 about, it's the same DIP financing Mr. Riecker  
7 is discussing in the passage of his declaration  
8 that I showed you, right?  
9 MR. GENENDER: Objection, misstates  
10 testimony.  
11 A. I'm just talking about the junior  
12 DIP financing that's referenced throughout all  
13 of these documents.  
14 Q. And that's the junior DIP financing  
15 that Mr. Riecker is discussing in his  
16 declaration, correct?  
17 A. He does discuss the junior DIP  
18 financing.  
19 Q. Any other strong views expressed in  
20 support of a going concern sale by Cyrus or its  
21 advisors?  
22 A. I can't recall specifically.  
23 Q. Do you recall, generally?  
24 A. I just went through one generally,  
25 that being in support of the DIP, which was a

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1 AEBERSOLD  
2 prerequisite to the going concern sale. I  
3 could characterize those views as strong, and I  
4 also think the absence of any view contrary to  
5 a going concern sale was certainly a piece of  
6 this.  
7 Q. Okay. Is there anything else you  
8 would add? I just want to make sure I have the  
9 whole story. Anything else you would add in  
10 support of Cyrus or its advisors expressing  
11 strong views in support of a going concern  
12 sale?  
13 A. I can't recall.  
14 Q. Okay. Switching topics. Would you  
15 agree with me that the 2L collateral was  
16 comprised of inventory and receivables?  
17 MR. GENENDER: Objection, form,  
18 calls for a legal conclusion.  
19 A. Generally speaking. I've not  
20 reviewed the collateral documents in detail.  
21 Q. Would you agree that a going concern  
22 sale was not the only way for the company to  
23 dispose of inventory?  
24 A. I would agree with that.  
25 Q. Would you agree that a going concern

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1 AEBERSOLD  
2 sale was not the only way to dispose of  
3 receivables?  
4 A. A going concern sale wasn't the only  
5 alternative.  
6 MR. LIUBICIC: I will pass the  
7 witness.  
8 THE WITNESS: Thank you.  
9 EXAMINATION BY  
10 MR. FOX:  
11 Q. Mr. Aebersold, my name is Edward  
12 Fox. I'm with the firm of Seyfarth Shaw, and I  
13 represent Wilmington Trust National Association  
14 as indenture trustee and collateral agent.  
15 Mr. Aebersold, do you recall the  
16 amendment to your retention -- to Lazard's  
17 retention with respect to assisting in debtors'  
18 asset sales?  
19 A. Generally, yes.  
20 Q. Do you recall whether it was limited  
21 to going concern sale transactions?  
22 A. Our amended engagement letter?  
23 Q. The court order amending your  
24 engagement.  
25 A. I would need to review my amended

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1 AEBERSOLD  
2 engagement letter to answer that. But,  
3 generally speaking, a sale transaction can take  
4 many forms, and I believe will still trigger  
5 the fee. So I'm not sure, but I don't think it  
6 would be isolated to a going concern sale.  
7 (Aebersold Exhibit 4, Order  
8 Approving Amendment to Terms and  
9 Conditions of the Debtors' Employment and  
10 Retention of Lazard Frères and Co., LLC,  
11 as Investment Banker, Dated January 23,  
12 2019, marked for identification.)  
13 Q. Mr. Aebersold, take a look, if you  
14 would, at what's been marked as Exhibit 4.  
15 Do you have that in front of you?  
16 A. Yes, I do.  
17 Q. Take a look, if you would, at --  
18 just for the record, Exhibit 4 is the order  
19 approving amendment to terms and conditions of  
20 the debtors' employment and retention of Lazard  
21 Frères and Co., LLC, as investment banker.  
22 It's Docket Number 1775, dated 1/24/19.  
23 Do you have that in front of you?  
24 A. Yes, I do.  
25 Q. Okay. Take a look at the second

Page 79

1 AEBERSOLD  
2 page, paragraph 2, if you would.  
3 Do you see that?  
4 A. (Document review.)  
5 Yes, I do.  
6 Q. Okay. Now, it says that "Section  
7 1(k) of the engagement letter shall be amended  
8 and restated as follows."  
9 And then it says, "Assisting the  
10 company in identifying and evaluating  
11 candidates for potential going concern sale  
12 transactions involving material assets of the  
13 company and advising the company in connection  
14 with negotiations and aiding in a consummation  
15 of any such sale transactions."  
16 Do you see that?  
17 A. I do.  
18 Q. Did I read it correctly?  
19 A. I believe so.  
20 Q. Okay. And it specifically uses the  
21 words "going concern sale transactions;" is  
22 that correct?  
23 A. That's correct.  
24 Q. Okay.  
25 A. So -- go ahead.

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1 AEBERSOLD  
2 Q. Mr. Aebersold, let's take a look  
3 back at Exhibit 1, which I think you have in  
4 front of you, and look at paragraph 20.  
5 You state there that, "No member of  
6 the second lien parties or their respective  
7 advisors advocated to Lazard that the debtors  
8 should liquidate instead of engaging in  
9 potential sale transactions."  
10 Is that correct?  
11 A. That's correct.  
12 Q. Are you suggesting that second lien  
13 parties should have advocated to Lazard for a  
14 liquidation instead of a potential sale  
15 transaction?  
16 A. No. This is just a statement that  
17 no one did. So whether or not they should  
18 have, that's absent from this comment.  
19 Q. Okay. Why is this statement  
20 relevant at all to the proceedings?  
21 MR. GENENDER: Objection, form,  
22 calls for legal conclusion.  
23 Q. You can answer.  
24 A. I'm just stating a fact.  
25 Q. Why did you state this fact?

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1 AEBERSOLD  
2 A. Because I'm putting the auction into  
3 context of conversations that we had along the  
4 way.  
5 Q. Did somebody ask you to state this  
6 fact in paragraph 20?  
7 MR. GENENDER: I'm going to object.  
8 Same instruction on privilege issues.  
9 You can answer subject to that.  
10 A. I can't answer.  
11 Q. Well, you can answer yes or no.  
12 MR. GENENDER: Actually, he can't.  
13 Excuse me. He can't because if the answer  
14 "yes or no" reveals a privileged  
15 communication, then that would invade the  
16 privilege.  
17 MR. FOX: Okay.  
18 Q. Mr. Aebersold, are you personally  
19 represented by Weil Gotshal?  
20 A. I am not personally represented by  
21 Weil Gotshal.  
22 Q. So let me ask you my question again.  
23 Why did you include paragraph 20,  
24 the statement in paragraph 20 in your  
25 declaration?

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1 AEBERSOLD  
2 MR. GENENDER: Objection, asked and  
3 answered.  
4 MR. FOX: No, it was not answered  
5 because you objected and said it was  
6 privileged.  
7 MR. GENENDER: Ask your questions.  
8 I'm not going to debate you. Just ask  
9 your questions. Just try and ask them  
10 once.  
11 A. At the advice of counsel, I'm not  
12 going to answer due to privilege.  
13 Q. The advice of which counsel?  
14 A. Weil Gotshal.  
15 Q. They're not representing you.  
16 A. But I certainly have --  
17 MR. GENENDER: Hang on a second.  
18 You don't need to answer that.  
19 MR. FOX: You can't direct him what  
20 to do if you're not his lawyer.  
21 MR. GENENDER: Excuse me. We are  
22 representing him for purposes of  
23 deposition. There's a privilege in place.  
24 Move on. It belongs to the company. Come  
25 on. Move on.

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1 AEBERSOLD  
2 MR. FOX: This is a fact witness,  
3 Paul.  
4 MR. GENENDER: Okay. There's a  
5 privilege attached to conversations with  
6 fact witnesses, too.  
7 MR. FOX: That aren't your client?  
8 MR. GENENDER: Ed, go ahead. I'm  
9 not debating you. Ask another question.  
10 MR. FOX: Are you directing the  
11 witness not to answer?  
12 MR. GENENDER: I already did. I  
13 gave him an instruction about privilege  
14 and he is following it.  
15 BY MR. FOX:  
16 Q. Mr. Aebersold, are you going to  
17 follow Mr. Genender's direction with respect to  
18 privilege?  
19 A. I am.  
20 Q. Okay.  
21 MR. GENENDER: Great.  
22 Q. Mr. Aebersold, did the ESL bid or  
23 the Transform bid provide a greater recovery  
24 for the debtors' estates and creditors than any  
25 other practically available alternative,

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1 AEBERSOLD  
2 including specifically a wind-down or  
3 liquidation of the debtors' business?  
4 A. I believe so.  
5 Q. Take a look, if you would, at  
6 paragraph 21 of Exhibit 1.  
7 Do you have that in front of you?  
8 A. I do.  
9 Q. Okay. You say, "To the contrary  
10 from nearly the beginning of these chapter 11  
11 cases, to the extent they advocated for any  
12 course of action, the second lien parties with  
13 whom Lazard was engaged consistently took the  
14 position that a liquidation would be inferior  
15 to a going concern sale."  
16 Which second lien parties are you  
17 referring to in this paragraph 21?  
18 A. I can't be certain, but it's --  
19 there could be others, but primarily ESL and  
20 Cyrus.  
21 Q. What's the basis of your knowledge  
22 for the statements in paragraph 21?  
23 A. (Document review.)  
24 Discussions with parties with whom  
25 Lazard was engaged.



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1 AEBERSOLD  
2 Q. Well, when you say "with whom Lazard  
3 was engaged," does that mean you personally?  
4 A. It includes me personally.  
5 Q. Okay. Does it include anybody else  
6 other than you?  
7 A. It includes other members of Lazard.  
8 Q. Okay. Were you present when other  
9 members of Lazard had -- were engaged with  
10 second lien parties?  
11 A. I will rephrase it for you.  
12 Q. No. Answer my question.  
13 MR. GENENDER: Hang on a second.  
14 Don't answer a question you don't  
15 understand.  
16 MR. FOX: That's not what he said.  
17 A. Could you -- slow -- could you just  
18 re-ask the question again?  
19 Q. Sure.  
20 MR. GENENDER: The reason he asked  
21 you to rephrase your question is he didn't  
22 understand it.  
23 MR. FOX: He didn't ask me to  
24 rephrase, but okay, fine.  
25 MR. GENENDER: Go ahead. Just ask a

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1 AEBERSOLD  
2 question.  
3 BY MR. FOX:  
4 Q. You said the second lien parties  
5 with whom Lazard was engaged.  
6 Are there other people at Lazard who  
7 were engaged with second lien parties other  
8 than you?  
9 A. Yes.  
10 Q. And were you present when those  
11 other people at Lazard were engaged with the  
12 second lien parties?  
13 A. I was not present in every  
14 interaction between members of Lazard and  
15 representatives from second lien parties.  
16 Q. Okay. So to the extent that you  
17 were present when Lazard was engaged with  
18 second lien parties, who were the second lien  
19 parties with whom you were engaged that you  
20 reference in paragraph 21?  
21 A. I think my prior answer was I can't  
22 be certain specifically if there were others,  
23 but it was primarily representatives from ESL  
24 and Cyrus.  
25 Q. Anybody else that you can recall?

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1 AEBERSOLD  
2 A. I can't recall specifically if there  
3 was anyone else. I just can remember the  
4 primary parties.  
5 Q. Which was Cyrus and ESL?  
6 A. I think that's what I said.  
7 Q. And you cannot remember being  
8 engaged with any other second lien parties  
9 besides them; is that correct?  
10 MR. GENENDER: Objection, asked and  
11 answered five times.  
12 Q. You can answer.  
13 A. I will just repeat my prior answer.  
14 Q. Do you recall personally being  
15 involved -- being engaged with Wilmington  
16 Trust?  
17 A. Not specifically, but I don't know  
18 who the representatives from Wilmington Trust  
19 would be. So I can't categorically say I never  
20 had interactions with them. I have had  
21 interactions with numerous people. I didn't  
22 know who they represented or what institution.  
23 Q. Let's turn to paragraph 23 of  
24 Exhibit 1. You refer to "the strong views  
25 expressed and actions taken by certain second

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1 AEBERSOLD  
2 lien parties during the sale and restructuring  
3 process."  
4 Do you see that language?  
5 A. I do.  
6 Q. What second lien parties are you  
7 referring to here in paragraph 23?  
8 A. Certainly, ESL is one of those  
9 parties. I think I had a conversation before  
10 with prior counsel regarding Cyrus. I'm not  
11 sure if I had direct conversations with any  
12 other second lien holder.  
13 Q. So can you recall any other  
14 conversations with second lienholders other  
15 than Cyrus and ESL?  
16 MR. GENENDER: Objection, asked and  
17 answered.  
18 A. I cannot recall specifically.  
19 Q. Do you recall generally?  
20 A. Maybe ask it in a different way for  
21 me. I'm having trouble -- I feel like I'm  
22 giving a pretty detect answer. I'm not trying  
23 to be coy.  
24 I can't remember categorically which  
25 party represents which firm. I wouldn't be

<p style="text-align: right;">Page 89</p> <p>1 AEBERSOLD</p> <p>2 able to recognize someone from Wilmington</p> <p>3 Trust's face, whether I've talked to them on</p> <p>4 the phone, they've been part of a call, they</p> <p>5 were in meetings with 50 to 100 people. I</p> <p>6 can't categorically say I haven't had</p> <p>7 conversations with other second lienholders.</p> <p>8 So when I answer "not specifically,"</p> <p>9 that's what I'm speaking to. I don't know what</p> <p>10 else I can do for you.</p> <p>11 Q. Do you recall any strong views ever</p> <p>12 expressed by Wilmington Trust?</p> <p>13 A. I can't recall specifically.</p> <p>14 Q. Okay. Are you familiar with</p> <p>15 something called Sears Home Services?</p> <p>16 A. Generally, yes.</p> <p>17 Q. And can you describe what Sears Home</p> <p>18 Services is?</p> <p>19 A. At a high level.</p> <p>20 Q. Tell me what you can in terms of a</p> <p>21 description of Sears Home Services.</p> <p>22 A. It wouldn't go much past what's in</p> <p>23 my prior declaration, but it's an</p> <p>24 umbrella-operating company within the larger</p> <p>25 Sears that has the home repair and warranty</p>	<p style="text-align: right;">Page 91</p> <p>1 AEBERSOLD</p> <p>2 subsidiaries.</p> <p>3 Q. Do you recall which subsidiaries</p> <p>4 it's a part of?</p> <p>5 A. No, not specifically.</p> <p>6 Q. Turning to paragraph 8 of Exhibit 1.</p> <p>7 A. Before that, quickly, Parts Direct</p> <p>8 was the third one.</p> <p>9 Which document?</p> <p>10 Q. Exhibit 1, turn to paragraph 8, if</p> <p>11 you would.</p> <p>12 You say, "Since filing the chapter</p> <p>13 11 cases, the debtors have explored a broad</p> <p>14 array of strategic alternatives."</p> <p>15 What's the basis of your knowledge</p> <p>16 of this paragraph 8?</p> <p>17 A. The basis of my knowledge is working</p> <p>18 to explore different avenues the company could</p> <p>19 pursue, working directly with management and</p> <p>20 other advisors.</p> <p>21 Q. So when you say "the debtors have</p> <p>22 explored," you mean the debtors have explored</p> <p>23 with Lazard's assistance?</p> <p>24 MR. GENENDER: Objection to form,</p> <p>25 misstates the testimony, the document</p>
<p style="text-align: right;">Page 90</p> <p>1 AEBERSOLD</p> <p>2 business, SHIP, and one other ancillary</p> <p>3 business. I can't recall the name of it.</p> <p>4 Q. When you said SHIP, do you mean</p> <p>5 Sears Home Improvement.</p> <p>6 A. Yes.</p> <p>7 Q. To your knowledge, is Sears Home</p> <p>8 Services a separate legal entity?</p> <p>9 MR. GENENDER: Objection, calls for</p> <p>10 legal conclusion.</p> <p>11 A. I can't recall specifically, but I</p> <p>12 do think it touches a number of legal entities</p> <p>13 within the organizational structure. But,</p> <p>14 again, I haven't looked at anything regarding</p> <p>15 that business in several months. So I can't</p> <p>16 be -- I can't be certain.</p> <p>17 Q. Do you have any recollection of what</p> <p>18 entity owns Sears Home Services?</p> <p>19 A. Not specifically.</p> <p>20 Q. When you said it touches several</p> <p>21 entities, what did you mean by that?</p> <p>22 A. I mean that there's a vast</p> <p>23 organizational structure to Sears, the parent</p> <p>24 company, Sears Holding Company, and that</p> <p>25 business is a part of a number of the</p>	<p style="text-align: right;">Page 92</p> <p>1 AEBERSOLD</p> <p>2 speaks for itself.</p> <p>3 A. The debtors had a number of advisors</p> <p>4 that I think assisted them through that</p> <p>5 process.</p> <p>6 Q. Other than Lazard?</p> <p>7 A. There are other advisors in addition</p> <p>8 to Lazard.</p> <p>9 Q. Okay. And so when you say, "The</p> <p>10 debtors have explored a broad array of</p> <p>11 strategic alternatives and options," I'm trying</p> <p>12 to understand the basis for your knowledge to</p> <p>13 the extent that Lazard was not involved in</p> <p>14 that.</p> <p>15 A. Can you re-ask the question, please?</p> <p>16 Q. Sure. Let me ask it this way.</p> <p>17 So when you say, "The debtors," in</p> <p>18 paragraph 8, "have explored a broad array of</p> <p>19 strategic alternatives and options," are you</p> <p>20 referring to the debtors' exploration with</p> <p>21 Lazard?</p> <p>22 A. I don't exactly understand the</p> <p>23 question. I think it's a bit more broadly in</p> <p>24 that we've had a number of meetings and</p> <p>25 discussions with company management, and</p>



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1 AEBERSOLD

2 whether it's the board or special committee of

3 the board discussing what the company's options

4 could be, and we have been a part of quite a

5 few of those conversations.

6 Q. So is it fair to say the basis for

7 your statement in paragraph 8 is based on your

8 meetings and discussions with the company and

9 its officers and directors?

10 A. Not exclusively, but that's

11 certainly an aspect of it.

12 Q. What else would be a basis for this

13 statement beyond that?

14 A. It's not exhaustive, but work done

15 by Lazard independently, Lazard's work in

16 conjunction with M-III, with Weil, work that

17 Weil and M-III have done independently, work

18 that management team has done independently.

19 Q. How do you know about work that Weil

20 and M-III have done independently?

21 A. Because we were -- we worked in

22 conjunction with them and had meetings in

23 conjunction with them where they would also

24 present analysis.

25 Q. So you would know that Weil and

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1 AEBERSOLD

2 M-III did work independently with respect to

3 paragraph 8 because they told you? Is that

4 what you're saying?

5 MR. GENENDER: Objection to the

6 extent you're trying to, again, invade

7 privileged communications.

8 You can answer that without

9 revealing anything privileged.

10 A. Each advisory firm does work on its

11 own at times because questions are asked of

12 them, they are asked to create a deliverable,

13 and those firms have provided deliverables, at

14 times, without input directly from Lazard.

15 We have also put together materials

16 or thought through issues collectively.

17 Q. So when other professionals have

18 done work independently, how did you become

19 aware of it?

20 MR. GENENDER: Objection, asked and

21 answered.

22 A. Because they either presented it or

23 we discussed it.

24 Q. Okay. Now, in paragraph 10 of

25 Exhibit 1, you say, "The debtors and their

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1 AEBERSOLD

2 restructuring committee, with the advice and

3 assistance of their advisors, ran a thorough

4 and competitive sale and restructuring

5 process."

6 What's the basis for that -- for

7 your knowledge of that statement?

8 A. It's similar to my prior answer.

9 Q. How is it similar?

10 A. You asked me, what's the basis for

11 me making this?

12 Q. Yes. What's the basis for your

13 knowledge that allows you to make this

14 statement?

15 A. Because I was directly involved with

16 the company and its other advisors throughout

17 the entire period.

18 Q. Okay.

19 MR. FOX: I don't have anything

20 further.

21 THE WITNESS: Okay. Thank you.

22 MR. GENENDER: We reserve questions

23 to the time of trial. We're done.

24 (Time noted: 10:12 a.m.)

25

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1 A C K N O W L E D G M E N T

2

3 STATE OF )

4 :ss

5 COUNTY OF )

6

7 I, BRANDON AEBERSOLD, hereby certify

8 that I have read the transcript of my testimony

9 taken under oath in my deposition; that the

10 transcript is a true, complete and correct

11 record of my testimony, and that the answers on

12 the record as given by me are true and correct.

13

14

15

16

17 BRANDON AEBERSOLD

18

19

20 Signed and subscribed to before me

21 this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

22

23

24 \_\_\_\_\_

25 Notary Public, State of \_\_\_\_\_

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1 C E R T I F I C A T E  
2  
3 STATE OF NEW YORK )  
4 :ss  
5 COUNTY OF RICHMOND )  
6  
7 I, MELISSA GILMORE, a Notary Public  
8 within and for the State of New York, do hereby  
9 certify:  
10 That BRANDON AEBERSOLD, the witness  
11 whose deposition is hereinbefore set forth, was  
12 duly sworn by me and that such deposition is a  
13 true record of the testimony given by such  
14 witness.  
15 I further certify that I am not  
16 related to any of the parties to this action by  
17 blood or marriage; and that I am in no way  
18 interested in the outcome of this matter.  
19 IN WITNESS WHEREOF, I have hereunto  
20 set my hand this 12th day of July, 2019.  
21  
22  
23  
24 \_\_\_\_\_  
25 MELISSA GILMORE

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1 \*\*\* ERRATA SHEET \*\*\*  
2 ELLEN GRAUER COURT REPORTING CO, LLC  
3 126 East 56th Street, Fifth Floor  
4 New York, New York 10022  
5 212-750-6434  
6  
7 NAME OF CASE: In Re: SEARS HOLDINGS CORPORATION  
8 DATE OF DEPOSITION: JULY 10, 2019  
9 NAME OF WITNESS: BRANDON AEBERSOLD  
10  
11  
12  
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14  
15  
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17  
18  
19  
20  
21 Subscribed and sworn before me  
22 this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.  
23  
24 \_\_\_\_\_  
25 (Notary Public) My Commission Expires:

	<b>advisor (4)</b> 30:23;67:4,8,11	<b>agreeing (1)</b> 65:14	94:21	72:6;83:5
<b>\$</b>	<b>advisors (42)</b> 13:8;14:2,10;21:21; 22:3;27:20;28:15;35:4; 43:20,24,25;44:2,12; 58:4,17;60:18;61:4; 62:4,10,11,19,25;63:7; 7,9,14,16;64:23;66:11; 69:25;72:15,19;74:9; 14;75:21;76:10;80:7; 91:20;92:3,7;95:3,16	<b>agreement (3)</b> 51:25;64:6;68:7	<b>anticipate (1)</b> 12:13	<b>Attorneys (3)</b> 3:4,14;5:4
<b>\$10 (2)</b> 19:10,13		<b>ahead (4)</b> 39:14;79:25;83:8; 85:25	<b>apologize (2)</b> 17:21;45:18	<b>auction (17)</b> 13:24;14:18;20:15; 37:10,11;60:5,9;61:16, 20,23;62:2,10;63:17; 65:8,11;67:19;81:2
<b>\$350 (4)</b> 55:10;56:8,11;57:7		<b>aiding (1)</b> 79:14	<b>appearing (1)</b> 12:7	<b>authorization (1)</b> 49:10
<b>A</b>		<b>airport (1)</b> 64:24	<b>appreciated (1)</b> 66:9	<b>authorized (2)</b> 37:18;72:19
<b>ability (3)</b> 63:23;64:2,9	<b>advisory (1)</b> 94:10	<b>AKIN (1)</b> 3:13	<b>appropriateness (1)</b> 12:21	<b>available (2)</b> 14:21;83:25
<b>ABL (1)</b> 49:10	<b>advocated (3)</b> 80:7,13;84:11	<b>al (1)</b> 3:5	<b>approval (4)</b> 49:24;50:2;52:5; 54:12	<b>Avenue (2)</b> 3:6;5:7
<b>able (3)</b> 21:8;72:11;89:2	<b>Aebersold (119)</b> 8:8;9:1;10:1,21,23, 24,25;11:1,11,23;12:1, 25;13:1,10;14:1,24; 15:1,23;16:1,21,25; 17:1,18:1;19:1;20:1; 21:1;22:1;23:1,24:1; 25:1;26:1;27:1;28:1; 29:1;30:1;31:1;32:1; 33:1;34:1,8,9,11,14; 35:1;36:1;37:1;38:1,4; 39:1;40:1;41:1,12; 42:1;43:1;44:1;45:1; 46:1;47:1;48:1;49:1; 50:1;51:1;52:1;53:1; 54:1,14,17,21;55:1; 56:1;57:1;58:1;59:1; 60:1;61:1;62:1;63:1; 64:1;65:1;66:1;67:1; 68:1;69:1;70:1;71:1; 72:1;73:1;74:1;75:1; 76:1;77:1,11,15;78:1,7, 13;79:1;80:1,2;81:1, 18;82:1;83:1,16,22; 84:1;85:1;86:1;87:1; 88:1;89:1;90:1;91:1; 92:1;93:1;94:1;95:1; 96:7,17	<b>allowed (1)</b> 51:10	<b>Approving (2)</b> 78:8,19	<b>avenues (1)</b> 91:18
<b>absence (1)</b> 76:4		<b>allows (1)</b> 95:13	<b>approximately (3)</b> 33:9,14;65:4	<b>aware (3)</b> 58:18;63:13;94:19
<b>absent (1)</b> 80:18		<b>Almost (2)</b> 38:12;42:13	<b>arguably (1)</b> 33:20	<b>B</b>
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